



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

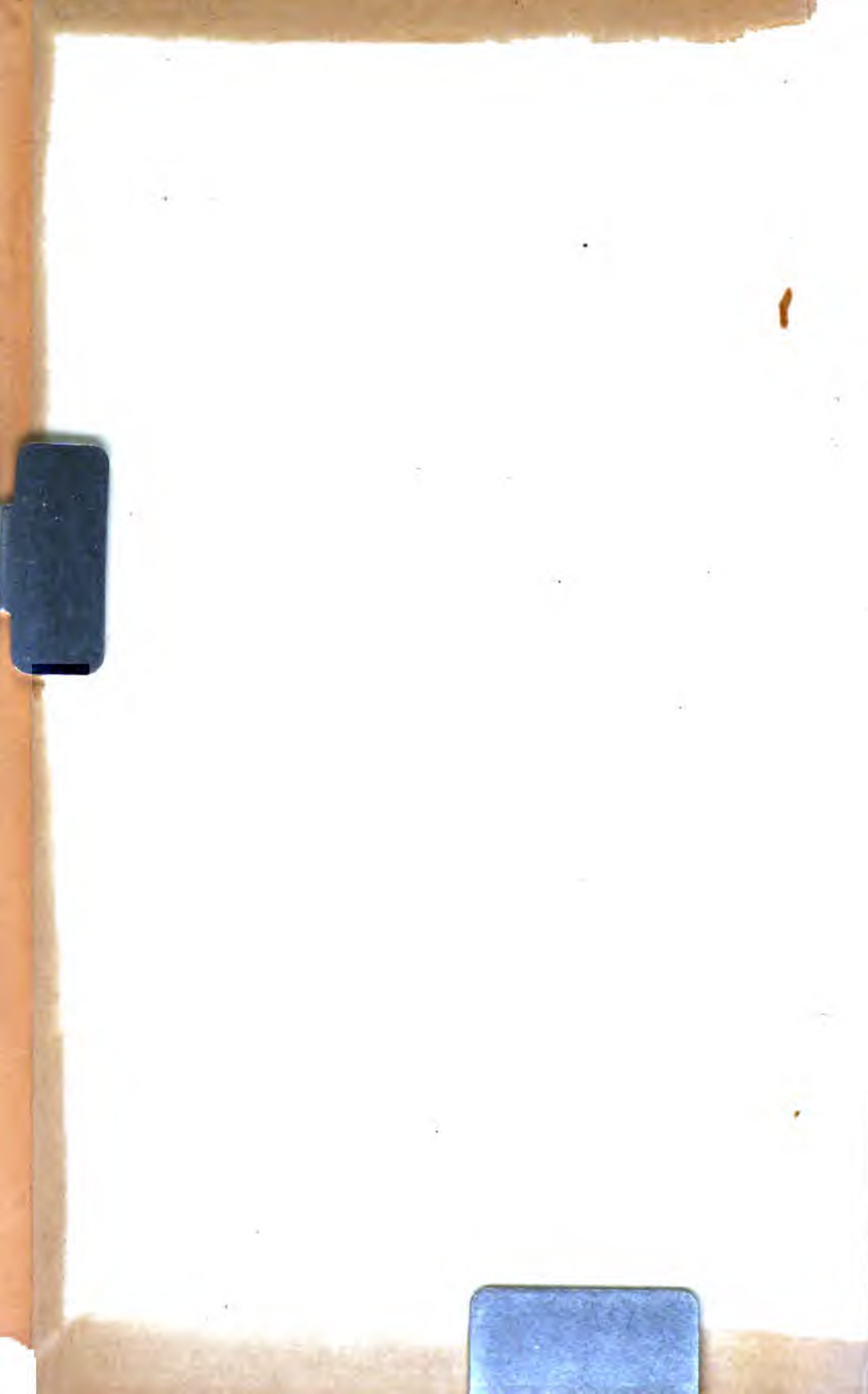
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

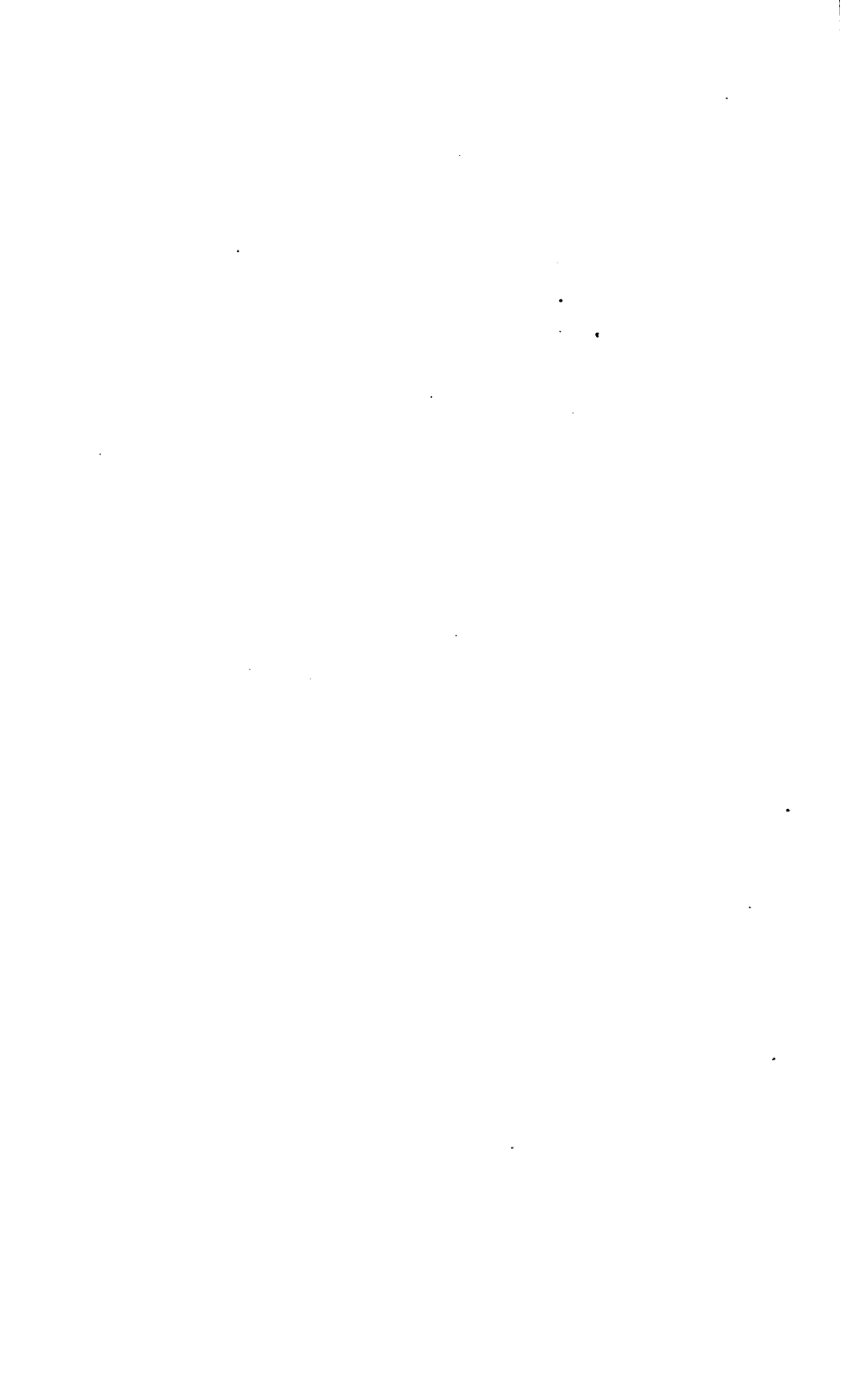
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

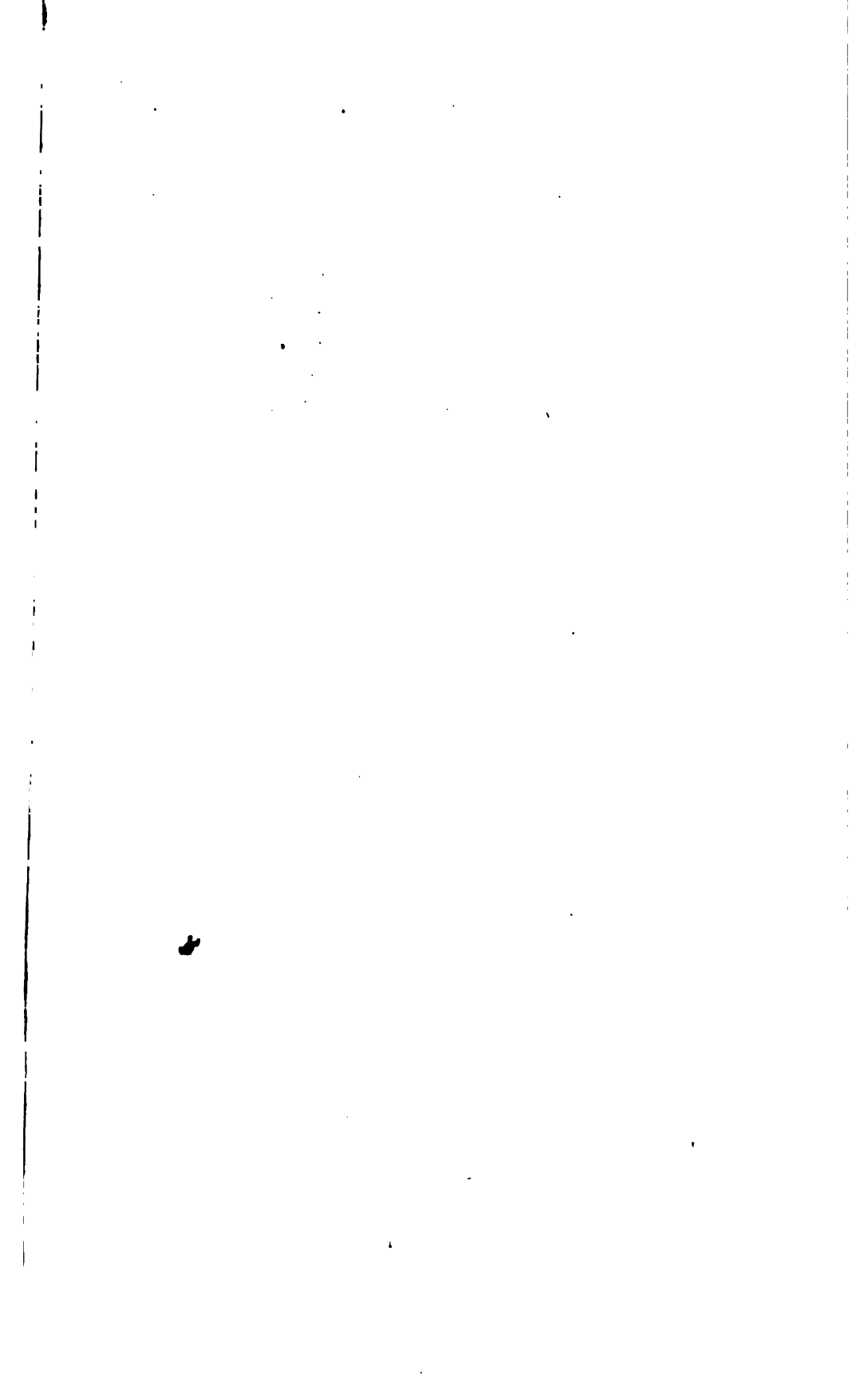
About Google Book Search

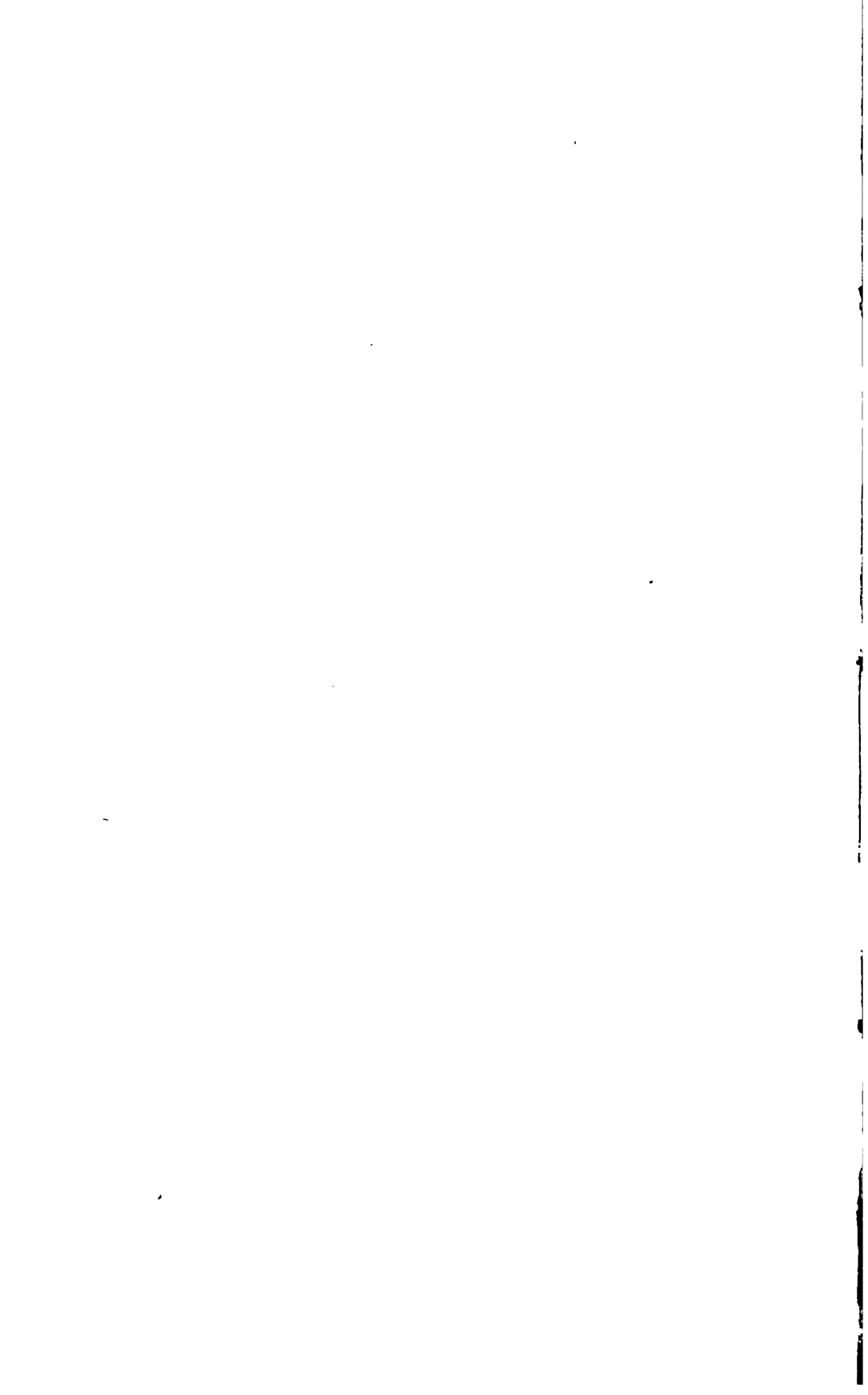
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



JSA
JAI
.HFF
V. 8







REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. VIII.

1856, 1857.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1872.

a. 85389

JUL 8 1901

Entered according to Act of Congress in the year 1872, by

LITTLE, BROWN, AND COMPANY,

In the Office of the Librarian of Congress at Washington.

CAMBRIDGE:

PRESS OF JOHN WILSON AND SON.

LORD CRANWORTH, LORD CHANCELLOR.

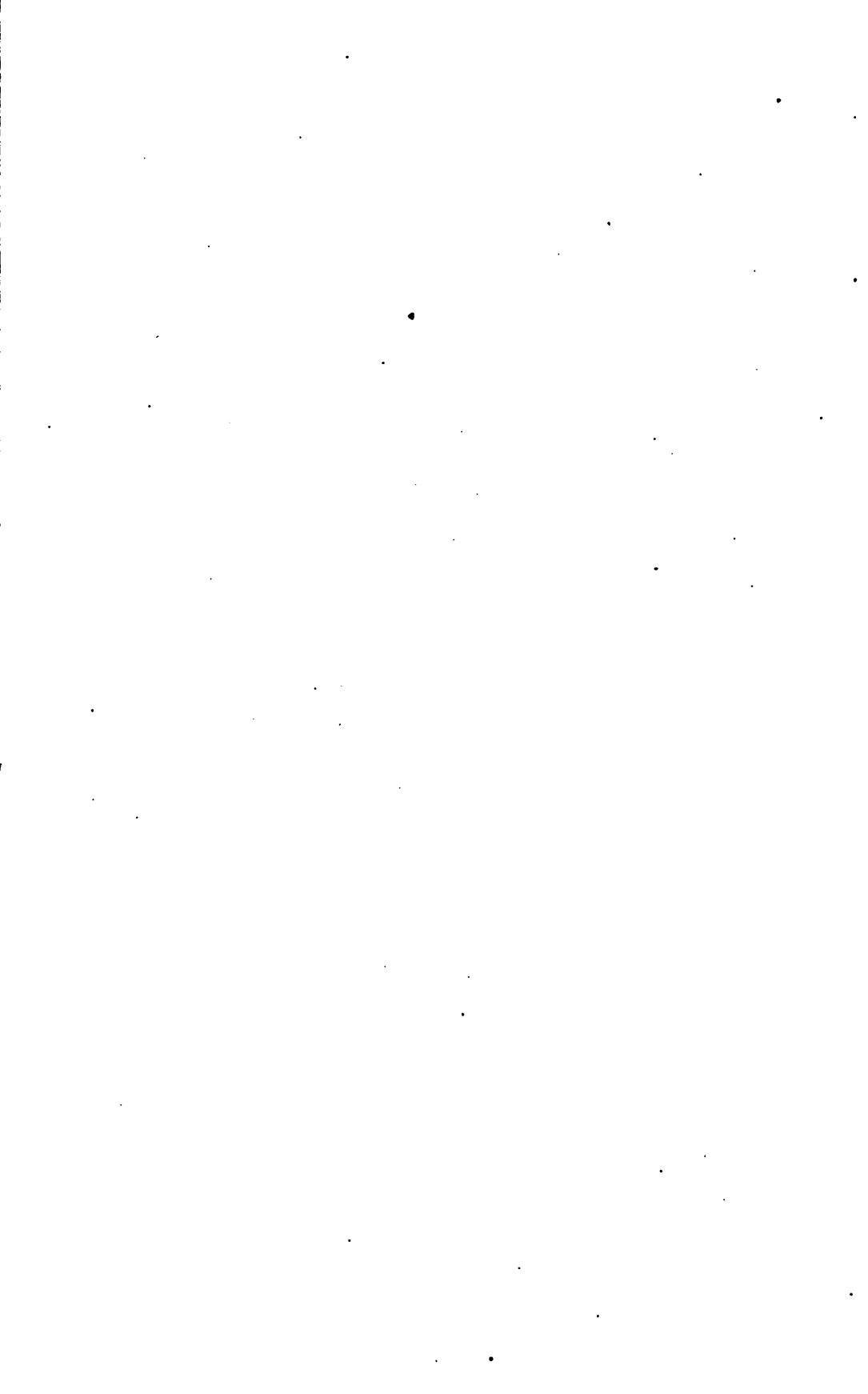
SIR JOHN ROMILLY, MASTER OF THE ROLLS.

SIR JAMES LEWIS KNIGHT BRUCE, }
SIR GEORGE JAMES TURNER, } LORDS JUSTICES.

SIR RICHARD TORIN KINDERSLEY, }
SIR JOHN STUART, } VICE-CHANCELLORS.
SIR WILLIAM PAGE WOOD, }

SIR RICHARD BETHELL, ATTORNEY-GENERAL.

THE RIGHT HONOURABLE JAMES ALEX- }
ANDER STUART WORTLEY, } SOLICITORS-GENERAL.
SIR HENRY SINGER KEATING, }



A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

[THE NUMERALS REFER TO THE MARGINAL PAGES.]

	Page
Alexander, <i>In re, Ex parte</i> Sanderson	849
Alt v. Gregory	221
Amazon Life Assurance and Loan Company, <i>In re</i> Blackburn's Case	117
Andrew v. Andrew	336
Armstrong, Walker v.	531
Ashton v. Wood	698
Atterbury v. Wallis	454
Attorney-General v. St. Cross Hospital	38
Bartley, Head v.	587
Barton, Horne v.	587
Bateman, <i>Ex parte, In re</i> Routledge	263
Bates v. Christ's College, Cambridge	726
Bentinck v. The Norfolk Estuary Company	714
Bewicke, Manby v. (No. 1)	468
(No. 2)	470
(No. 3)	476
Bishop, Cox v.	815
Blackburn's Case, <i>In re</i> The Amazon Life Assurance and Loan Company	117
Blaggrave v. Routh	621
Booth, Snow v.	69
Bradford, Mayor, &c., of, Ferrand v.	93
Bradling v. Plummer	747
Bremridge, Evans v.	100
Briggs, Langdale v.	391

	Page
Brutton, Lake <i>v.</i>	440
Bulkeley <i>v.</i> Hope	36
Burrows, <i>In re</i> , <i>Ex parte</i> Taylor	254
Byng, Webb <i>v.</i>	633
Carter <i>v.</i> Cropley	680
Cave <i>v.</i> Cave	131
Chadwick <i>v.</i> Holt	584
Chappell <i>v.</i> Davidson	1
Christ's College, Cambridge, Bates <i>v.</i>	726
Clavering <i>v.</i> Ellison	663
Clegg <i>v.</i> Edmonson	787
Clifton, Wintour <i>v.</i>	640
Coventry, Evans <i>v.</i>	835
Cox <i>v.</i> Bishop	813
Crabb, <i>Ex parte</i> , <i>In re</i> Palmer	277
Crawhall's Trust, <i>In re</i>	480
Crofts <i>v.</i> Middleton	192
Cropley, Carter <i>v.</i>	680
Crossfield, Horne <i>v.</i>	587
Davidson, Chappell <i>v.</i>	1
Davis <i>v.</i> The Earl of Dysart	33
Denne <i>v.</i> Light	774
Dickson, <i>In the Matter of</i>	655
Dix, Manser <i>v.</i>	703
Drysdale <i>v.</i> Piggot	546
Dysart, The Earl of, Davis <i>v.</i>	33
East India Company, Wadeer <i>v.</i>	183
Edmonson, Clegg <i>v.</i>	785
Ellison, Clavering <i>v.</i>	663
Ellison's Estate, <i>In re</i>	62
Evans <i>v.</i> Bremridge	100
<i>v.</i> Coventry	835
Fenwick <i>v.</i> Potts	506
Ferrand <i>v.</i> The Mayor, &c., of Bradford	93
Finch, Thompson <i>v.</i>	560

TABLE OF CASES REPORTED.

vii

	Page
Foreman, Osborne v.	122
Forshaw v. Higginson	827
Furse, Younge v.	756
Gallemore v. Gill	567
Geaves, <i>Ex parte, In re Strahan</i>	291
Gill, Gallemore v.	567
Godson, Holmes v.	152
Grainger v. Slingsby	885
Gregory, Alt v.	221
v. Pilkington	616
Guilden Sutton, <i>Ex parte</i> Incumbent of	880
Gulliver v. Vaux	167
Halliday v. Temple	96
Hawker v. Hallewell	818
Head, Bartley v.	587
Crossfield v.	587
Higginson, Forshaw v.	827
Hodgson v. Smithson	604
Holmes v. Godson	152
v. Powell	572
Holt, Chadwick v.	584
Hope, Bulkeley v.	36
v. Hope	731
Horne v. Barton	587
Hoskins v. Matthews	13
Howell v. Kightley	325
Jarvis, Shillibeer v.	79
Kightley, Howell v.	325
King, Olliver v.	110
v. Savery	311
Kitchen, Robinson v.	88
Lake v. Brutton	440
Langdale v. Briggs	391

TABLE OF CASES REPORTED.

ix

	Page
Robinson v. Kitchen	88
Rogers, <i>Ex parte</i> , <i>In re</i> Selby	271
Martineau v.	328
Routh, Blagrove v.	621
Routledge, <i>In re</i> , <i>Ex parte</i> Bateman	263
Rowe, Molyneux v.	368
St. Cross Hospital, Attorney-General v.	38
St. Marylebone Joint Stock Banking Company, Walker's Case	607
Sanderson, <i>Ex parte</i> , <i>In re</i> Alexander	849
Saumarez, <i>In re</i>	390
Savery, King v.	311
Selby, <i>In re</i> , <i>Ex parte</i> Norton	258
Rogers	271
Shillibeer v. Jarvis	79
Slingsby, Grainger v.	385
Smithson, Hodgson v.	614
Snow v. Booth	69
Stourton v. Stourton	760
Strahan, <i>In re</i> , <i>Ex parte</i> Geaves	291
Taylor, <i>Ex parte</i> , <i>In re</i> Burrows	254
Temple, Halliday v.	96
Thompson v. Finch	560
Ulster Railway Company, Newry and Enniskillen Railway Com- pany v.	487
Vanderplank, Wright v.	133
Vaux, Gulliver v.	167
Vial, <i>In re</i>	439
Vorley v. Richardson	126
Wade, <i>Ex parte</i> , <i>In re</i> Wade	241
Wadeer v. The East India Company	182
Walker's Case, <i>Re</i> St. Marylebone Joint Stock Banking Com- pany	607

	Page
Walker v. Armstrong	531
Wallis, Atterbury v.	454
Walton's Estate, <i>In re</i>	173
Webb v. Byng	633
Whitbread v. Lyall	383
Wintour v. Clifton	641
Wood, Ashton v.	698
Wright v. Vanderplank	133
Younge v. Furse	756

[THE NUMERALS REFER TO THE PAGING AT THE TOP.]

A.		Page	Attorney-General v. Parker	Page
Abney v. Miller		347	v. Rutter	686
Adams v. Fisher		728	v. Sheffield Gas Consumers' Company	803
Adamson v. Wilson		1	v. Wilkins	557
Aitcheson v. Fair		803	v. Wilkinson	686
Aitchison v. Dixon		13	Atwood v. Vincent	440
Alcock, Ex parte		264	Auriol v. Smith	498
Aldrich v. Cooper		440	Austen v. Howard	106
Allen v. Anthony		579	v. Twyne	46
Allfrey v. Allfrey	134,	631		
Altham's Case		168	B.	
Althorpe, Ex parte		381	Baddeley v. Curwen	729
Andrews, Ex parte		549	Baggett v. Meux	200
v. Bishop		391	Bailey v. Barnberger	257
v. Essex Ins. Co.		530	v. Gundry	468, 469
Angier v. Angier		738	Baker's Case	162
Anon. 1 And. 33		670	Baker v. Bradley	132, 133, 138
Dyer, 33		161	Baldwin v. Cawthorne	113
Archer v. Hudson		133	Ballard v. Goffe	367
Arkwright v. Colt	819,	820	Banks v. Ollerton	201
Armitage v. Coates		499	Barclay, Ex parte	302
v. Walker		499	Barker v. Barker	605
Armstrong v. Eldridge	228,	230	Barlow v. Osborne	121
Arundell v. Arundell		260	Barnes v. Patch	367
Aston v. Curzon		557	Barnhart v. Greenshields	513
Atkins v. Atkins		670	Barrow v. Barrow	640
Atterbury v. Wallis		514	Barston v. Kilvington	535
Attorney-General v. Brereton		46	Bartlett v. Hartan	94
v. Chester,			v. Van Zandt	257
Corp. of		347	Barwis, Ex parte	256
v. Countess de			Bassford v. Blakesley	477
Wahlstatt	13		Bateman v. Ross, Countess of	738
v. Dew		842	Baylies v. Payson	391
v. Forster		686	Beachcroft v. Broome	155
v. Hall		154	Beason v. State	16
v. Harley		406	Beattie v. Johnson	28
v. Johnstone		407	Beaufort, Duke of v. Phillips	585
v. Lawes		335	Beaumont v. Meredith	842
v. London,				
Corp. of		728		
v. Munro		33		
v. Newcome		686		

xiii

	Page		Page
Carr v. Taylor	260	Cotton v. Scarancke	526
Carrington v. Payne	408	Couden v. Clerke	172
v. Pell	842	Coventry v. Lauderdale	527
Carron Iron Company v. Maclaren	106	Cox v. Dolman	69, 71, 73
Castle v. Fox	391, 414	v. Goodday	47
Caton v. Rideout	257	Coxe v. Day	131
Cawood v. Thompson	406	Craigie v. Lewin	14
Cawthorne, Re	335	Crause v. Cooper	603
Chadwick v. Holt	584	Crawshaw v. Maule	803
Champion v. Rigby	134	Cripps v. Wolcott	127
Chapman v. Chapman	513	Cromwell's, Lord Edward, Case	216
Cheeseborough v. Millard	440	Cross v. De Valle	391
Chesterman v. Mann	800	Crowder v. Clowes	569
Chicot v. Lequesne	498	Crozier v. Fisher	127, 128
Cholmondeley v. Clinton	587	Cummings v. Powell	257
Church v. Mundy	645	Cunningham v. Murray	228
Churchill v. Marks	156	Curtis v. Price	513
Clache's Case	168	Cuthbert v. Purrier	154
Clack v. Holland	549	Cutler, In re	260
Clark v. Cogge	775	Cutter v. Whittemore	100
v. Phillips	668		
Clarke's Case	167		D.
Clarke v. Lubbock	328		
Clavering v. Westley	819, 820	Dalby v. India and London Life Assurance Company	549
Clayton v. Lowe	328	v. Pullen	132
Clegg v. Fishwick	786, 796, 798, 800, 801, 803	Dale, Ex parte	302
Close v. Wilberforce	819, 820	v. Hamilton	361
Clough v. Ratcliffe	842	Dalhousie v. M'Donnall	14
Coard v. Holderness	373	D'Almaine v. Moseley	407
Cobb v. Simmonds	283, 284	Dalrymple v. Dalrymple	736
Cochran v. Cochran	437	Daniell v. Daniell	842
Cockran v. Cockran	407	Daniels v. Davison	581
Cole v. Scott	130, 391, 407, 414, 437	Dann v. Spurrier	84
Coleman v. Fraser	347	Darby v. Darby	130
v. Mellersh	623, 631	v. Smith	303
Colemore v. Tyndall	612	Darke v. Williamson	827
Collier v. Rivaz	14	Darley v. Langworthy	228, 408
Collinge v. Collinge	796, 808, 809	Davenport v. Coltman	373
Collins v. Archer	557	Davies v. Stainbank	106
v. Doyle	407	Davis v. Getty	498
Colyer v. Finch	557, 564	Dawson v. Massey	134
Combe v. London, Corp. of	477	v. Sadler	498
Concord v. Rumney	13	Day v. Croft	569
Constable v. Bull	155	De Bonneval v. De Bonneval	14
Cook v. Collingridge	798	De Mattos v. Gibson	1
v. Holmes	376	Derby Bank v. Heath	1
Cooke v. Blake	612	Dering, Ex parte	284
v. Maxwell	183	v. Winchelsea, Lord	106
Cooper v. Cooper	328, 531	De Sobrey v. De Laistre	730
Copeland, Ex parte	242, 243, 245, 249, 250, 252	Deverell v. Bolton, Lord	83
Copis v. Middleton	446	Dickson, Re	667
Coppin v. Fernyhough	407, 435	Dickson's Trusts	670
Corbet's Case	161	Dillon v. Parker	645
Corley v. Corley	258	Dobson v. Groves	498
Corpe v. Overton	256	Doe v. Alderson	581
Cother v. Midland Railway Co.	720	v. Allcock	216, 232

	Page		Page
Gibson v. Jeyes	623	Hardy v. Reeves	557, 581
Gifford, <i>Ex parte</i>	106	Harford v. Rees	842
Gill v. Shelley	645	Hargreaves v. Rothwell	512
Gillett v. Peppercorne	798	Harmony, The	14
GitTINGS v. Macdermott	174	Harmood v. Oglander	536
Glass v. Hulbert	530	Harries, <i>In re</i>	623
Gleason v. Fayerweather	152	Harris v. Davis	174, 668
Glyn v. Caulfield	184	v. Pepperell	530
Godfrey v. Humphrey	367	Harrison v. Andrews	260
Gooch v. Gooch	587	v. Foreman	671
Goode v. Harrison	256	v. Nettleship	106
Goodlad v. Burnett	407	v. Round	406
Goodman v. Sayers	498	Hart, <i>Ex parte</i>	323
Goodright v. Glazier	347	v. Clarke	549, 552, 786, 799, 801, 804
Goodtitle v. Southern	386	v. Tulk	409
Gordon v. Gordon	581	Hartley v. Cook	46
Gore v. Gore	169	v. Rice	758
Gorham v. Canton	16	Harvard College v. Gore	13, 25
Goshawke v. Chiggell	527	Harvey, <i>Ex parte</i>	113
Gosling v. Gosling	391	v. Shelton	498
Gottlieb v. Cranch	549, 552	Hatch v. Hatch	133, 134, 149, 623, 630
Gourlay v. Somerset, Duke of	347	Havens v. Sackett	649
Graham v. Birkenhead, &c., Railw. Co.	786	Hawker v. Hallowell	563, 804
Grazebrook v. Davis	499	Hawkins v. Gathercole	748
Green v. Bicknell	265, 268	Hawley v. Northampton	152
v. Harvey	154	Hawley and the North Staffordshire Railway Co., <i>In re</i>	499
v. Hayman	216	Haydon's Case	216
v. Morris	530	Hayes v. Ward	440
v. Weaver	88, 90, 92	Heaphy v. Hill	800
Greenhill v. Church	498	Hearle v. Hicks	373
Greenwood v. Curtis	730	Hegeman v. Fox	16, 25
v. Sutherland	426	Heming v. Swinnerton	498
Gregory v. Mighell	347	Henchliffe, <i>Ex parte</i>	302
v. West	347	Henderson v. Bize	245
v. Wilson	84, 710	Hewes v. Dehon	391
Griffin v. Griffin	801	Hewison v. Negus	738
Grissell v. Swinhoe	640	Hewitt v. Loosemore	453, 459, 464, 466
Grizewood v. Blane	245	v. Price	89
Grove v. Bastard	426	Hibblewhite v. M'Morine	252
Gulliver v. Vaux	155, 156, 162, 165, 166	Hick v. Mors	347
Gwinett v. Bannister	498	Hicks v. Sallitt	645
Gwynne v. Edwards	603	Hiern v. Mill	459
		Hill v. Crolls	738
H.		Hillersdon v. Lowe	668
Haldane v. Eckford	13, 25, 27, 28	Hind, <i>Ex parte</i>	280
Hall v. Robertson	527	Hitchcock v. Sedgwick	420
Hallet v. Bassett	13	Hoare v. Barnes	527
Hallifax v. Wilson	406	Hobbs v. Norton	201
Hamblett v. Hamblett	640	Hodges, <i>Re</i>	381
Hame v. Bentinck	183	v. Horsfall	346, 349
Hannam v. South London Waterworks Co.	94	Hodgson v. Shaw	446
Harcourt v. Harcourt	603	Hoghton v. Houghton	133
Hardman v. Johnson	803	Holden's Estate, <i>Re</i>	63
		Hole v. Escott	131

	Page		Page
Holland v. Eyre	81	Jones v. Gibbons	303
Holmes v. Blogg	256, 257	v. James	315
v. Greene	13	v. Jones	728
v. Holmes	257	v. Lewis	98
Holt v. Ward	256	v. Randall	228
Home v. Pillans	328, 330	v. Reynolds	581
Honner v. Morton	133, 147, 587	v. Roberts	630
Hopcraft v. Hickman	499	v. Roe	212
Horlock v. Smith	623, 656, 660	v. Smith	575
Horne v. Barton	587, 588	v. Suffolk, Lord	670
Horwood, Ex parte	302	Jordan v. Jones	204
Houston, Ex parte	852	Joy v. Campbell	302, 310
Howell v. Kightley	700		
Howton v. Frearson	775		
Huddleston v. Briscoe	346		
Humble v. Shore	230		
Humphries v. Brogden	581		
Hunt, Re	763		
v. Hunt	367		
Hunter v. Nockolds	69, 71		
Hurst v. Padwick	468		
Hutchins v. Denziloe	47		
Hutton v. Weems	827		
Hyde v. Baldwin	640		
		K.	
I.		Kay v. Smith	470, 471, 474
Ibbetson v. Ibbetson	406, 409, 438	Kekewich v. Manning	210
Innocent v. North Midland Rail- way Co.	719	Kennedy v. Green	458, 459, 463, 466
Ive v. King	605	Kennet, Ex parte	245
		Kerr v. Middlesex Hospital	386
		Key v. Key	216
		Kilburn v. Bennett	16
		Kincaid's Trust, In re	260
		King, Ex parte	280
		v. Smith	439
		Kirkman's Trusts, In re	603
		Knight v. Davis	407, 409
		Knollys v. Alcock	347
		Knott v. Morgan	1
		Knox v. Turner	546
		L.	
J.		Lake v. Brutton	546
Jackson v. Rowe	458, 459	Lamb v. Orton	470
v. Turnley	391	v. Williams	557
Jarman v. Woolloton	303	Lane v. Burghart	264
Jarratt v. Aldam	132	Laneville v. Anderson	14
Jeffrey v. Honeywood	636	Langford, Lord v. Little	536
Jenkins v. Jenkins	520	Langham v. Nenny	260
v. Portman	819	Langton, Ex parte	63
v. Quinchant	535	Larkin, In re	328
Jenkinson v. Harcourt	406	Latch v. Wedlake	106
Jennings v. Moore	512	Lawless v. Mansfield	620, 623, 631
Jennison v. Hapgood	13, 25	Lawton v. Ford	69
Jenour v. Jenour	335	Lea v. Hinton	549, 552
Jerrard v. Saunders	557	Leach v. Leach	786
Jesson v. Wright	373	Leacroft v. Maynard	569
Job v. Bannister	710	Leaf v. Gibbs	105
Johnson v. Hudson	89	Leeds, Duke of v. Amherst v. Amherst, Earl of	587 133
v. Johnson	331	Leeming v. Sherratt	127
Johnston, Ex parte	280	Legard v. Johnson	735
Johnstone v. Beattie	14	Legh v. Legh	201
Jones v. Bromley	671	Le Jenne v. Le Jeune	605
v. Boulter	204		
v. Geddes	106		

	Page		Page
Le Neve v. Le Neve	512	Matthews v. Wallwyn	623
Lethbridge, <i>Re</i>	657	Maugham v. Vincent	527
Lewis v. Duncomb	69	Maunsell v. White	758
v. Rees	513	Mayhew v. Crickett	445
Lichtenthaler v. Thompson	440	Mead v. Boxborough	13
Lidderdale v. Robinson	440	v. Orrerry, Lord	407
Lightburne v. Gill	155, 156, 159	Meath, Bishop of v. Winchester,	
Lincoln, Lord v. Rolles	347	Marquis of	407
Lingen v. Sowry	76	Mellish v. Mellish	636
Lister v. Lister	585	Mellor, <i>Ex parte</i>	245
Lloyd v. Atwood	453	Merrifield v. Jones	1
v. Branton	668	Metcalf v. Putnam	530
v. Harvey	76	Midland Railway Company v.	
Load v. Green	302	Oswin	373
Lock v. Foote	536	Mildmay's, Sir Anthony, Case	171
Lockhart v. Cameron	258	Miles v. Ervin	630
Loddington v. Kime	201	v. Langley	581
Londesborough's, Lord, Case	609	v. Pressland	585
Long v. Dennis	670	Miller and Others v. Moor	171
v. Ricketts	668, 670	Millican v. Vanderplank	123, 125
Lonsdale v. Littledale	498	Mills v. Banks	587
Loveren v. Lamprey	391	v. Mills	386
Lowther v. Carlton	512	Milnes v. Gery	347, 735
Lucas v. Comerford	817, 819, 820, 825	Milton v. Edgworth	618
v. James	84	Mines Royal Societies v. Magnay	106
Lumley v. Wagner	736, 738	Mirehouse v. Scaife	830
Lyman v. Fiske	15	Molyneux, <i>Ex parte</i>	63
Lyons v. Blenkin	764	Monday v. Guyer	842
Lyster v. Mahony	347	Montesquieu v. Sandys	623
Lytton v. Lytton	587	Moore v. Greg	819, 820
		Moores v. Choat	819, 820, 824, 825
		Moorhouse v. Lord	13
		Morgan, <i>Ex parte</i>	606
		v. Holford	347
		Morland v. Isaacs	549
		Morse v. Merest	735
		v. Royal	134
		Mountford v. Scott	459, 512
		Moysey v. Hillcoats	61
		Mundy v. Jolliffe	361
		Munro v. Munro	14
		Munroe v. Douglas	14
		Murray v. Palmer	134
		v. Walter	183
		Muschamp v. Bluet	161, 165
		Myers v. United Guarantee So-	
		ciety	549
		N.	
		Napier v. Napier	645
		Neachell's Trust, <i>Re</i>	63
		Neathway v. Reed	126, 127, 128, 479,
			484, 605, 606
		Needles v. Needles	258
		Neesom v. Clarkson	133
		Nevius v. Dunlap	530

M.

Maberly v. Strobe	527
MacAdam v. Logan	131
Maccallum v. Turton	88, 89
M'Dermott v. Wallace	228
Macdonald v. Bryce	127
M'Dougall v. Paton	852
Machem v. Machem	258
Mackreth v. Symmons	347
McNeil v. Arnold	258
Maltass v. Maltass	14
Manby v. Bewicke	468
Mansfield, Earl of v. Ogle	69
Mansfield's, Lord, Case	179
March v. Marchant	373
v. Russell	134
Marrow, <i>Re</i>	439
Marshall v. Rutton	735
Martin, <i>Ex parte</i>	302, 852
Mason v. Clarke	637
v. Wakeman	728
Massenburgh v. Ash	169
v. Ashe	168
Massie v. Drake	656
Matheson, <i>Ex parte</i>	242, 245, 250, 252

	Page		Page
New Hampshire Savings Bank v.		Pennington v. Muncaster, Lord	326
Colcord	440	Penny v. Clarke	603
Newkirk v. Newkirk	152	v. Pickwick	805
Newland v. Majoribanks	373	v. Watts	513, 514, 572
Newton v. Chorlton	446	Perrin. <i>Ex parte</i>	279
Nicholls, <i>Ex parte</i>	279	Perry Herrick v. Attwood	453
Nichols v. Chalie	498	Pery v. White	228
v. Roe	498	Peterson v. Ayre	499
Nicholson, <i>Ex parte</i>	280	Peto v. Peto	106
v. Revill	106	Phelps v. Overton	630
v. Whalley	552	Phillipo v. Munnings	71
Nightingale v. Dodd	842	Phillipson v. Gatty	133
Noel v. Henly	406	Pidcock v. Bishop	105
v. Noel	406	Pledge v. Buss	446
Norman's Trusts, <i>Re</i>	527	Plews and Middleton, <i>In re</i>	498
Norris v. Caledonian Insurance Co.	546	Plowden v. Hyde	535
North, <i>Re</i>	763	Plunket v. Holmes	199, 201, 206, 209
Norway v. Rowe	581, 798	Pocock v. Lincoln, Bishop of	636
Novello v. James	1	Pomfret v. Ricroft	775
O.		Ponton v. Hawker	318
		Poole v. Bott	671
Oakley v. Rigby	245	Portington's, Mary, Case	171
v. Ruby	242	Powles v. Hargreaves	819
Oates v. Jackson	635	Powys v. Mansfield	76
Osborne v. Foreman	122	Prendergast v. Turton	798, 801, 804
O'Toole v. Brown	373, 407	Price v. Assheton	361
Ottoy v. Pensam	347	v. Parker	131
Owen v. Homan	445	Pritchard's Trusts, <i>Re</i>	127
v. Thomas	347	Procter v. Bath and Wells, Bishop of	671
Owens v. Dickenson	201	Prothero v. Phelps	106
Oxwith v. Plummer	581	Pulsford v. Richards	841
		Putnam v. Johnson	13
		Pym v. Lockyer	76
P.		Q.	
Padley v. Lincoln Waterworks Co.	729	Queen, The v. Grant	500
Page v. Leapingwell	407	R.	
Palin v. Hills	330		
Palmer, <i>Ex parte</i>	154	Race, <i>In re</i>	763
Parbury's Case	179	Rakestraw v. Brewer	798
Parke v. Lamb	536	Randcliffe, Lord v. Parkyns	645, 648
Parker v. Carter	645	Randall v. Russell	803
v. Sowerby	127, 645	Ravenscroft v. Frisby	71
Parkhurst v. Lowten	88	Raw v. Pote	201
Parkin v. Knight	174	Rawe v. Chichester	798
Parnell v. Lyon	758	Read v. Snell	173
Parsons v. Freeman	535	Reeve v. Long	169
Paxton v. Douglas	89	Reynell v. Luscombe	498
Pearce v. Edmeades	228	v. Sprye	445
Pearl v. Deacon	446	Reynolds v. Waring	346, 361
Pearson v. Rutter	174	Rex v. Castle Morton, Inhabitants of	346
Peile v. Stoddart	477, 479	Rex v. Page	283, 284
Pell v. Brown	168, 169		
Pelly v. Wathen	587		

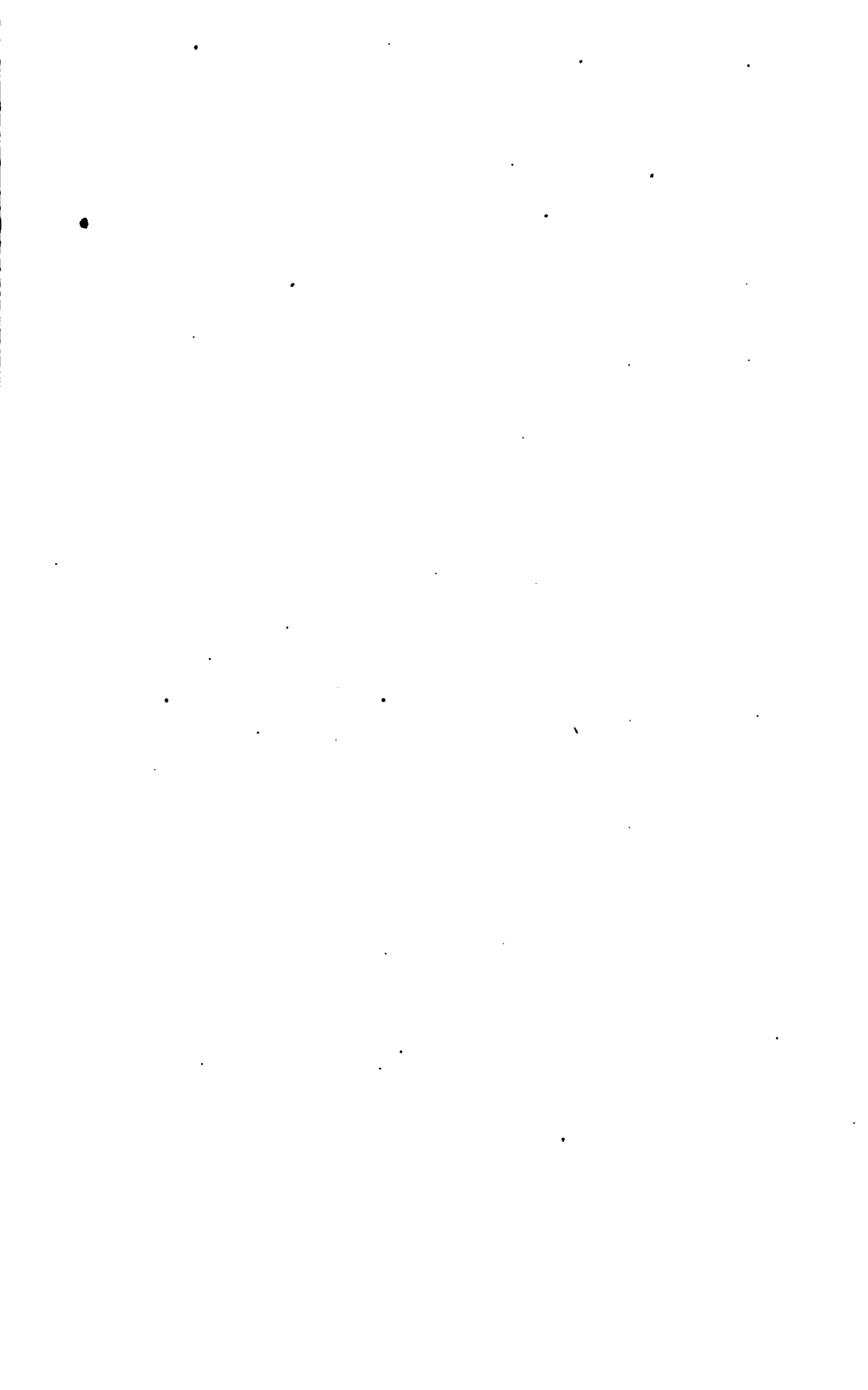
	Page		Page
Rex v. Watson	183	Shadbolt v. Thornton	406, 407
Rice v. Gordon	105, 106	Shaftesbury, Earl of v. Russell	303
Richards, <i>Re</i>	439	Shapland v. Smith	513
v. Scarborough Public		Sharpus's Case	179
Market Co.	720	Shaw v. Neale	620
Richmond's Executor's Case	842	v. Shaw	25
Ridge v. Newton	386	Shay v. Pettes	530
Ridgway v. Wharton	84	Shillibeer v. Jarvis	347
v. Woodhouse	670	Short v. Mercier	88, 89
Right d. Jefferys v. Bucknell	201, 203	Sicilies, King of the Two v.	
Rippiner v. Wright	346	Wilcox	89
Roberts v. Eberhardt	803	Simpson v. Walker	347
v. Lloyd	201	Skarf v. Soulbly	109
v. Tunstall	134	Slade v. Milner	328
Robertson v. St. John	549	Smith, <i>Ex parte</i>	315
Robinson v. Grey	512	<i>In re</i>	312
v. Lamond	88	v. Clay	587, 803
v. Rosher	819, 820	v. Cowdery	758
Robson v. Fallows	242	v. East India Co.	183
Roch v. Callen	71	v. Godfrey	730
Rock v. O'Brien	133	v. Guild	640
Roddy v. Williams	458	v. Henley	346
Roe v. Yeud	373	v. Mawhood	89
Rogers v. Rogers	391	v. Smith	526, 527, 640
Rooke v. Kensington	391	Smith's Will, <i>Re</i>	127
Rose v. Green	281, 284	Snow v. Cutler	169, 171
v. Mynott	630	Snowball v. Proctor	636
Ross v. Ross	154, 159	Somerville v. Somerville	13, 14
Rossum v. Taylor	243	Soper, <i>Ex parte</i>	852
Rowland v. Witherden	842	Spackman v. Evans	607
Rye's Trusts, <i>Re</i>	381	Spalding v. Spalding	672
		Spaulding v. Spaulding	168
		Stacey v. Elph	587
		Stainbank v. Fernley	841
		Stanhope's Case	609
		Standish v. Radly	587
		Stanley v. Bernes	14
		Starr v. Vanderheyden	630
		Stead, <i>Ex parte</i>	279
		v. Nelson	201
		Stedman v. Collett	623
		Steel v. Brown	113
		Stephenson v. Roype	453
		Stevens, <i>Ex parte</i>	575
		v. Cooper	440
		v. Jackson	285
		Stewart v. Great Western Rail-	
		way Co.	100
		Stikeman v. Dawson	256
		Stillman v. Weedon	132
		Stirke, <i>Re</i>	656
		Stirling v. Forrester	106
		Stockbridge Iron Co. v. Hudson	
		Iron Co.	530
		Stocks v. Dobson	459, 466
		Stokes v. Salomons	373, 409
		v. Trumper	842
		Stones v. Rowton	131

S.

Sadd v. Maldon, Witham, and	
Braintree Railway Co.	720
Sainthill v. Bound	98
St. John v. St. John	735
St. John, Lord v. St. John, Lady	
735, 743	
Salem v. Lynn	16
Sanders v. Benson	819, 820, 825
v. Rodway	736
Sanford v. Sanford	230
Sargent v. Roberts	409
Saumarez v. Saumarez	373
Savage v. Carroll	76
Savery v. King	133
Sawyer v. Hovey	530
Sayer v. Wagstaff	623, 656
Scattergood v. Edge	169
Schnell v. Tyrrell	671
Scholastica's Case	161
Sears v. Boston	13
Selby v. Alston	347
Simple, <i>Re</i>	106
Senhouse v. Christian	798

	Page		Page
Strachan's Estate, <i>Re</i>	63	Usticke v. Peters	640
Stradling v. Morgan	217	Utterson v. Vernon	269
Stronge v. Hawkes	201		
Stump v. Gaby	132	V.	
Sturgess v. Pearson	328	Vandeleur v. Vandeleur	409
Sury v. Pigot	775	Vanderplank v. King	139, 140
Sutherland, Countess of v. North- more	132	Vaughan v. Headfort, Marquis of	636
Swinborne v. Nelson	728	Vawser v. Jeffery	535
Symons v. James	569	Veale v. Warner	499
		Viner v. Cadell	302
T.		v. Hawkins	323
Talbot v. Shrewsbury, Earl of	763	Virginie, La	14
Tanner v. King	13		
Tattersall v. Howell	668, 670	W.	
Taylor v. Hemming	98	Wade v. Coope	446
v. Parry	581	Wagstaff v. Wagstaff	391
v. Shum	820	Wait v. Belding	391, 437
v. Stibbert	581	Waite v. Combes	386
Teasdale v. Teasdale	117, 118	v. Templer	174
Tebbot v. Voules	347	Wakefield v. Buccleugh, Duke of	1
Theelluson v. Woodford	420, 640	v. Phelps	391
Theobald v. Defay	210	Walcot v. Botfield	668, 670
Theobalds v. Duffoy	210	Wales, Princess of v. Liverpool, Earl of	96, 98
Thistlethwayte's Trust, <i>Re</i>	527	Walker v. Frobisher	498
Thomas v. Kemeys	76	v. Vincent	152
Thorndike v. Boston	13, 16	Waller v. King	499
Thrasher v. Everhart	730	Walmesley v. Booth	134
Thurston v. Cunningham	535	Walter's Case	609
Thynne v. Glengall, Earl of	76	Walters v. Northern Coal Min- ing Co.	819, 820, 825
Tickner v. Tickner	536	Walton v. Walton	348
Todd, <i>Ex parte</i>	265	Warburton v. Hill	585
Tolson v. Dykes	585	Warbutton v. Warbutton	645
Tomlinson v. Dighton	155, 168	Ward v. Arch	71
Toovey v. Lindsay	738	v. Ward	827
Tope v. Hockin	113	Ware v. Cann	154, 165
Toulmin v. Steere	512	v. Egmont, Lord	459, 466, 512,
Towle v. Towle	1		575
Townley v. Bolton	228	v. Watson	326, 700
Townshend v. Warren	803	Warner v. Warner	373
Trafford v. Boehm	386	Warrender v. Warrender	735
Trimmer v. Hayne	76	Warwick v. Bruce	256
Tuck v. Silver	1	v. Hawkins	569
Tuckerman v. Jefferies	228	Washburn v. Goodman	12
Tulk v. Moxhay	821	Waterlow v. Bacon	100
Turner v. Turner	326, 586, 587, 700	Waters v. Taylor	623
Tweddell v. Tweddell	535	Watkins v. Williams	152, 154
Tylee v. Webb	512	Watson, <i>Ex parte</i>	256
Tyler v. Drayton	477	Weall v. Rice	76
		Wearing v. Smith	250
U.		Weaver v. Meath, Earl of	89
Udny v. Udny	13, 27, 28	Webb v. Grace	758
Underhill v. Harwood	106	v. Manchester and Leeds Railway Co.	719
v. Horwood	105	Webster v. Hale	328

	Page		Page
Wedderburn v. Wedderburn	134, 798	Wills v. Stradling	961
Weeks v. Patten	640	Wilson, <i>Ex parte</i>	850
Welby v. Welby	645, 650	v. Kearse	256, 257
Wellesley v. Beaufort	670	v. Leonard	819
Wells v. Porter	242, 243, 245	v. Terry	16
West v. Reid	549	v. Wilson	9, 736, 738
Westmeath, Earl v. Westmeath, Countess	735	Winter v. Anson, Lord	512
Westmeath's, Lord, Case	743	Withy v. Mangles	528
Wheate v. Hall	587	Witty v. Marshal	763, 764
Wheatley v. Bastow	440	Wodehouse v. Farebrother	106
Wheeler, <i>Re</i>	439	Wood v. Barron	636
v. Walker	758	v. Griffith	587
Whicker v. Hume	14	v. Lambirth	201
Whieldon v. Spode	409	v. Rowcliffe	842
Whiston v. Stodder	730	Woodin, <i>Ex parte</i>	301
Whitcher v. Hall	105	Woolley v. Smith	264, 268
White v. Wakefield	581	Wordsworth v. Wood	605
v. White	13	Worrall v. Jacob	735
Whitfield v. Brand	302	Worthington v. Morgan	458, 459
Whitney v. Sherborn	13	Wren v. Bradley	758
Wickens v. Evans	346	Wright v. Atkyns	420, 427
Wicker v. Mitford	228	v. Rose	409
Wigsel v. Smith	535	v. Wright	173, 201, 210, 587
Wilbraham v. Ludlow	13	Wyatt v. Gore	183
Wildman's Trusts, <i>In re</i>	603	Wyndham v. Wyndham	230
Wild's Case	635, 636	Wyse, <i>Re</i>	69
Wilkinson v. Adam	645		
v. Charlesworth	260	Y.	
Williams v. Evans	406	Yalden, <i>In re</i>	154, 155
v. Owens	535	Yalden's Case	156
Willion v. Berkley	216	Yelland's Case	179
Willis v. Parkinson	312	Young v. Peachy	133
Wills v. McCormick	499	v. Waterpark, Lord	71



REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

CHAPPELL v. DAVIDSON.¹

1856. January 11. Before the LORDS JUSTICES.

In a case of alleged fraudulent imitation of a musical publication (independently of copyright), where the Court did not consider the fraud clearly made out: *Held*, that an injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action, and to be answerable in damages.² *Semble*, that it is now almost universally the practice, on granting an interlocutory injunction, to require an undertaking to be answerable in damages.³

¹ See S. C., 18 C. B. 194; 2 Jur. N. S. 544; 25 L. J. C. P. 225.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1642, 1643 and notes; 2 Story Eq. Jur. § 951 a.

³ The undertaking was formerly required only in cases where the application was *ex parte*, but the present course is to require the undertaking as well where the motion is on notice as where it is *ex parte*. Kerr Inj. 212, 621, 622; Tuck v. Silver, Johns. 218; De Mattos v. Gibson, 5 Jur. N. S. 347; Adamson v. Wilson, 3 N. R. 368; Wakefield v. Duke of Buccleugh, 11 Jur. N. S. 523; Novello v. James, 5 De G., M. & G. 876 and n. (1); 2 Dan. Ch. Pr. (4th Am. ed.) 1666 and notes. In some of the United States, Courts are ordinarily required, before issuing an injunction previous to notice or appearance, and generally have the power to compel the party, at whose request the injunction issued, to give bonds with sureties to the adverse party, conditioned for the payment of all damages which may arise from the issuing of the injunction if it is dissolved. See Genl. Sts. Mass. c. 138, § 16; Rule in Ch. N. Hamp. 36, 38 N. H. 612, 613; The Derby Bank v. Heath, 45 N. H. 524; Towle v. Towle, 46 N. H. 431; Merrifield v. Jones, 2 Curtis C. C. 306; Chancery Rules in N. Jersey, §§ 41, 42, 2 McCarter, 522.

THIS was an appeal from the decision of Vice-Chancellor Wood, granting an interlocutory injunction, restraining the defendant from publishing a song called "Minnie, dear Minnie," as being a fraudulent imitation of a song published by the plaintiff, called "Minnie."

The case is reported below, in the second volume of Messrs. Kay & Johnson's Reports, (a) where the facts are fully stated.

Mr. Daniel and *Mr. Selwyn* for the defendants, in support of the appeal, contended that the publications were essentially
 * 2 different, and that no injunction ought * to have been granted, and that at all events the plaintiff ought to have been put upon the terms of bringing an action, and undertaking to be answerable in damages.

Their Lordships, at the conclusion of the appellant's case, only desired to hear the respondent's counsel upon the question, whether any and what terms ought have been required by the court from the plaintiff upon granting the injunction.

Mr. Rolt and *Mr. C. Barber*, for the plaintiff. — An action was not here required to guide the decision of the Court. This is not a question of mere legal copyright. It is one as to the fraudulent imitation of a trade-mark and quite as properly the subject of equitable as of legal jurisdiction, if not more so.

They referred to *Knott v. Morgan*. (b)

[THE LORD JUSTICE KNIGHT BRUCE. — Has it not been for the last twelve or thirteen years an almost universal practice to require, on granting an injunction, an undertaking on the part of the plaintiff to be answerable in damages? Must not the plaintiff show, in any case, that such terms ought not to be required?]

We submit that this is so clear a case of fraud, and one on which this Court is so much more competent to decide than a Court of Law, that the Vice-Chancellor acted rightly in not requiring an action to be brought or any undertaking as to damages.

* *Mr. Daniel* was not called on to reply.

* 3

THE LORD JUSTICE KNIGHT BRUCE. — It is impossible to express any approbation of the course which the defendant has pursued ; but it is a different question whether the facts in evidence afford a sufficiently safe ground for a Court of justice to act upon without more. I certainly am not myself so clearly satisfied that there is here what the Court can consider to be a representation, that the song published by the defendant is the song sung by Madame Thillon, as to consider it safe to grant an interim injunction without giving the defendant an opportunity of trying the case before a jury. In my opinion, notwithstanding the jurisdiction which this Court clearly has in cases of fraud, this is one especially fit to be submitted to a jury. I am of opinion, therefore, that (as the condition of this injunction being allowed to continue) the plaintiff must give an undertaking to be answerable in damages as from the date of the first interim order, and for the whole period of the continuance of the injunction, and must undertake to bring an action within a limited time.

THE LORD JUSTICE TURNER. — The plaintiff's title to an injunction depends on a legal right, which right depends on this question of fact, whether the defendant is or is not representing the song which he is selling to be the song published by the plaintiff. I am not prepared to say that there are no cases of that kind in which this Court may not interfere at once. But when a plaintiff comes into a Court of Equity with a title founded on a legal right, he must satisfy the Court that he has the legal right on which he *relies. Now in this case the song published by *4 the defendant has a different title from that of the song published by the plaintiff ; it is represented on the title-page as being sung by different singers from those mentioned on the plaintiff's title-page, and the title-pages are in other respects different. The plaintiff's title-page represents his song to have been sung not only by Madame Thillon but by Miss Dolby. The words of the song are different. The music of both is taken from a composition to which neither party have a greater right than the other, and although it may be that some persons not conversant with such matters might take one song for the other, the question is, whether any person who could understand and be likely to purchase such a

publication would be so deceived. I am not satisfied of this, and although, therefore, there appears to me sufficient in the case to sustain the injunction, I think that it can only be continued on the terms of the plaintiff bringing an action and undertaking to be answerable in damages, as my learned brother has mentioned.

1855. December 8, 11. 1856. January 15. Before the LORDS JUSTICES.

The ordinary import of language of a letter giving full authority to deal with the property of another, ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document.

Where, therefore, a foreign merchant wrote to his English correspondent directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place and dispose of the father's money as if it was the son's own property, and stating that, as the son informed the father of every thing, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he said it himself, and must guide the consignee: *Held*, —

1. That the son was thus constituted, not merely an agent with full powers to act for his father, but that the consignee was justified in setting off, with the son's concurrence, a debt due to the father against one due from the son.
2. That, although on one or two occasions the consignee had required a written authority from the son before so acting, neither this circumstance nor the terms of the letters rendered any writing necessary, but that a verbal direction or subsequent adoption by the son was sufficient.
3. That the circumstance of the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between the plaintiff and it, however it might be composed.

THIS was an appeal from the decision of the Master of the Rolls, allowing exceptions to the Master's report, and the question was whether, upon an account directed by the decree in the cause of all dealings and transactions between the plaintiff and the defendant, as the agent of the plaintiff, the defendant either ought not to have been charged with or ought to have been allowed in discharge the proceeds of the cargo of a vessel called the *St. Paul*

Serge. The defendant having been charged by the report with the proceeds in question, the Master of the Rolls allowed exceptions to the report in that respect, and the appeal now before the Court was from the order allowing these exceptions.

The question arose thus : The plaintiff, a merchant at Tangiers, for some time before the year 1840 employed the defendant and his late father, merchants in London, as his consignees and agents, and after the * death of the defendant's late father in * 6 the year 1840, continued so to employ the defendant, who continued to carry on the business of the house in London.

The course of business between the plaintiff and the London house was this : The plaintiff consigned goods to the London house or to their correspondents abroad ; the goods were sold, and the proceeds having been received by or remitted to the London house, were invested in the purchase of return cargoes, which were sent to, or to the order of, the plaintiff.

Throughout the period whilst these transactions were going on the plaintiff's son also resided in London, and he superintended such of the purchases and sales on the plaintiff's account as were made in the London market, being allowed by the plaintiff a commission for this superintendence. The plaintiff's son also carried on business in London on his own account, and in the course of that business had large transactions with the defendant's house.

Early in the year 1842 the plaintiff consigned a cargo of goods to Messrs. De la Rue Brothers, of Genoa, correspondents of the defendant. Messrs. De la Rue Brothers sold these goods, and in the month of May, 1842, remitted the proceeds, amounting to 2664*l.* 4*s.* 5*d.*, to the defendant. The plaintiff's son was at this time largely indebted to the defendant on the account between them ; and on the 20th of May, 1842, the sum remitted was placed by the defendant to the son's account, and thus applied in part liquidation of the balance due to the defendant from the son. The cargo had been insured by the defendant on account of the plaintiff, and the premium of insurance had been originally charged by the defendant to the plaintiff's account, but it was afterwards * transferred to the account of the son. The sum so placed * 7 to the son's account was 2664*l.* 4*s.* 5*d.*, and was the subject of the exceptions.

The authority of the plaintiff, which the defendant acted upon in thus setting off a debt due to the father against one due from

the son, and the sufficiency of which to justify the proceeding was the principal question on the appeal, was contained in letters from the father to the defendant's firm, as constituted before the death of the defendant's father. The letters were in the Spanish language, and the material parts of them, being translated, were the following : —

February 18th, 1839. The plaintiff to Messrs. Lubbock : —

"I beg of you when I consign you any of my property on my own account, that you will consider it as the property of Judah my son, and acknowledge him owner of the money which you may have at any time of mine."

February 27th, 1839. Same to the same : —

"In my last of the 18th I wrote to you by my son Judah, and now I confirm to you, that any time that you may have any money of mine you may acknowledge my son Judah as myself, so that he may place and dispose of my money as if it was his own property, and you will acknowledge him as the owner of the money."

December 2d, 1839. Same to the same : —

"In all my business I hope that you will consult with my son Judah for purchases as well as for sales, the same as if he was myself; and I have already written my said son that he must consult with you." . . . "I have a letter from Joseph Pariente, at * 8 Gibraltar, he says * that he ordered you on the 31st of

October to insure the cargo for the nameless value of 5000*l*. I hope you have done this in due time; and as my son Judah informs me of every thing, I shall not continue my writing; and whatever my said son may say for me is the same as if I said it myself, which must guide you."

A further question was raised, whether the son had in fact directed the sum in question to be carried to his own account, and this was the subject of conflicting evidence, not necessary to be detailed, and on which their Lordships came to the conclusion that there had been a sufficient direction to that effect, or at all events a sufficient subsequent adoption of the proceeding. It appeared, however, that neither the direction or adoption was in writing, and that on one or two previous occasions the defendant's

firm had required and obtained a written direction from the plaintiff's son.

The above statement of the facts is transposed to this place from the judgment of the Lord Justice TURNER. The case is reported below in the 20th volume of Mr. Beavan's Reports, (a) and the authorities there referred to were again relied upon on the appeal.

Mr. Lloyd, Mr. W. Hislop Clarke, and Mr. Dowdeswell, for the appeal.

Mr. Roupell and Mr. Cairns, for the defendant.

1856. January 15.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the first question is whether, according to the true construction, the just interpretation of the * letters of February and December, 1839, * 9 from the plaintiff Mr. Pariente the father, it was competent to the defendant, as representing the mercantile house of Lubbock & Co., to apply the proceeds of the cargo, whose proceeds form the main or only subject of dispute, to any purpose that the son of Mr. Pariente the father should direct, although a purpose known at the time by the defendant as one in which the father was not and the son was interested; and I find myself unable to answer this question otherwise than in the affirmative. To repeat an expression used during the argument, the son was in effect made by the father in those letters an *alter ego* for every purpose now material, — at least so I read them. They were, it must be recollected, written in the Spanish language, a language that must be taken to have been familiar and habitual to the plaintiff. The accuracy of translation into English has not been disputed.

The other question is, whether according to a just view of the whole evidence, it ought to be considered that subsequently to those letters the defendant was directed by the son, or received from him authority, to apply the proceeds of the cargo as they have been applied by the defendant; and my opinion is, that this question also must be answered in the affirmative. Nor should I be

speaking sincerely were I to say that, as a judge of fact, I have any, the least, doubt upon it.

The materials before us perfectly convince me that his appeal is groundless, and ought to be dismissed with costs.

The Lord Justice TURNER, after stating the facts, proceeded as follows: It cannot, of course, be disputed that in ordinary
 * 10 * cases, an agent cannot be justified in applying the moneys of his principal otherwise than on account or for the use of the principal; and least of all can an agent be justified in applying his principal's moneys in payment of a debt due to himself from another agent of the same principal; but an agent is bound to obey the orders of his principal, and the duty and obligation of the agent must, therefore, in each case depend upon the directions which his principal may have given.¹ We must see, therefore, in the present case, what were the directions which the plaintiff had given. [His Lordship read the letters above set out.]

Up to the period when these letters were written the defendant's house was bound to obey the orders of the plaintiff only. The object of these letters must have been to alter that state of circumstances. To what extent, then, was it intended that this alteration should go. The plaintiff contends that it was intended only to place his son in his own position, and to enable him to deal with the account for his, the plaintiff's purposes. But the language of the letters imports no such limit, and it is difficult to suppose that any merchant, entertaining such an intention, could have expressed himself in such terms as these. There is, moreover, as it seems to me, a stronger argument against the construction thus contended for by the plaintiff. If that construction be well founded it must, as it seems to me, have become the duty of the defendant's house, at least in all cases where the purpose to which the plaintiff's son intended to apply the moneys or property was open to doubt or suspicion, to have refused to act upon his directions without the further authority or sanction of the plaintiff. How could it be intended that this should be the case when the property was to be considered as the son's, and he was to be acknowledged as the owner of the money?

* 11 * It was attempted, on the part of the plaintiff, to cut down the effect of these letters, by treating them as an ex-

¹ See Story, Agency (6th ed.), § 192; *Wilson v. Wilson*, 26 Penn. St. 394.

tension merely of the then existing relation between the plaintiff and the defendant's house, and by reference to the general rule, that the authority of an agent is not to be extended beyond the purpose of the agency, but neither of these arguments seems to me to be well founded. When the relation is intended to be altered the existing relation cannot be the measure of the alteration intended to be effected, and the rules which apply when the relation of principal and agent is constituted cannot, as I think, bear upon the question what was the relation which was intended to be constituted. That question depends, I think, upon wholly different considerations, and certainly, I am not inclined to hold, that if the party creating the relation uses ambiguous or uncertain language, he can afterwards complain of the person with whom he has created the relation for acting upon the ordinary import of the language he has used.¹

I believe the law to be otherwise, and I think, therefore, the defendant was well warranted in treating the plaintiff's son as having full authority to deal with the proceeds in question. But then it was insisted on the part of the plaintiff that a written authority was necessary to warrant the defendant in placing these proceeds to the account of the plaintiff's son, and that not only was there no such written authority, but that the defendant in so dealing with the proceeds, acted without any authority whatever from the plaintiff's son, and even without any communication with him upon the subject. The letters, however, say nothing as to a written authority being required, and although on one or two previous occasions, when the plaintiff's funds were dealt with by his son, the defendant seems to have required a written authority, those instances are clearly not sufficient * to es- * 12
tablish any general course of dealing in that respect. It was, I think, upon the plaintiff, if he intended to limit the power of his son, to have in terms imposed that limit. I see no right which the plaintiff could have to insist, that because the defendant took precautions in some instances he was therefore bound in every instance to take the same precautions. Upon the question whether authority was given to the defendant by the plaintiff's son to place these proceeds to his account, I have felt no difficulty. I am fully satisfied, that if there was not antecedent authority,

¹ See Story, Agency (6th ed.), § 74.

there was, at all events, subsequent adoption, which, I think, was sufficient, within the terms of the letters. Having read the evidence, however, I think it right to add that, had it been necessary to decide the question of antecedent authority, I think it must have been decided in favour of the defendant. I very much distrust the evidence given by the plaintiff's son.

It was further argued, although but faintly, on the part of the plaintiff, that the defendant could not avail himself of these letters, as they were addressed to the partnership between him and his father, and not to him individually, but I think this argument fails also, for I regard these letters as having imposed a duty on the defendant's house which, as I apprehend, would continue in force so long as the relation between the plaintiff and the house subsisted, of whatever members the house might be composed. A new firm could not adopt the agency and repudiate the terms on which it was created.¹

Upon these grounds my opinion in this case coincides with that of the Master of the Rolls, and the appeal must therefore be dismissed with costs. I have felt more doubt upon the case

* 13 than I should otherwise have * done, from the great respect which I entertain for the opinion of the learned Master by whom this question was originally decided, and from the care and attention which he has evidently given to the subject, but with all respect to his judgment, I cannot, in this case, agree with it.

HOSKINS v. MATTHEWS.²

1855. November 19, 21, 22. 1856. January 16. Before the LORDS JUSTICES.

Although permanent residence abroad without intent to return may not operate as a change of domicile, if believed to be necessary for health's sake, the circumstance, that such residence was occasioned by mere preference of climate, or by the opinion that the air or the habits of the country may be

¹ See *Washburn v. Goodman*, 17 Pick. 519.

² S. C., 2 Jur. N. S. 196; 25 L. J. Ch. 689.

better suited to the health than those of the country which has been quitted, will not be sufficient to prevent such permanent residence from so operating.¹

THIS was an appeal motion against an order of the Vice-Chancellor Wood, declining to vary the chief clerk's certificate, but was substantially against so much of the certificate only as related to the domicile of the late Mr. Matthews, the testator in the cause, the appellant contending that Mr. Matthews was in and throughout the year 1838, and thenceforth to his death, domiciled in England; the respondent contending that in or after the year 1839 he became domiciled in Tuscany, and was domiciled in Tuscany in the year 1843, or some earlier time, continually until his death, which happened in the year 1850.

The facts and the arguments appear sufficiently from the judgments.

Mr. Willcock and *Mr. Cairns*, in support of the appeal.

Mr. Headlam, Mr. Selwyn, Mr. W. A. Collins, Mr. Charles Hall, Mr. Cottrell, and Mr. Cole, for the several respondents.

Mr. Willcock, in reply.

¹ See *Haldane v. Eckford*, L. R. 8 Eq. 631; *Moorhouse v. Lord*, 10 H. L. Cas. 272; *In re Capdevielle*, 2 H. & C. 985; *Attorney-General v. Countess de Walestatt*, 3 H. & C. 374, and note at end of this case in Am. ed.; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *Aitchison v. Dixon*, L. R. 10 Eq. 589, 595, 596; *Somerville v. Somerville*, 5 Ves. (Sumner's ed.) 750 notes (b), (c), (d); *Story Conf. of Laws*, § 44 *et seq.*; *Jennison v. Hapgood*, 10 Pick. 77; *Harvard College v. Gore*, 370, 372-377; *Thorndike v. Boston*, 1 Met. 242; *Sears v. Boston*, 1 Met. 250; *Carnoe v. Freetown*, 9 Gray, 357; *Wilbraham v. Ludlow*, 99 Mass. 587; *Putnam v. Johnson*, 10 Mass. 488; *Tanner v. King*, 11 Louis. 175; *Opinion of the Judges in 5 Met. 588, 589, supp.*; *White v. White*, 3 Head (Tenn.), 404. "Change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period, as upon its being without an intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence, will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home and place of abode; the intention and actual fact of residence must concur, when such residence is not in its nature temporary." COLT J., in *Hallet v. Bassett*, 100 Mass. 170, 171; see *Whitney v. Sherborn*, 12 Allen, 111, 113, 114; *Mead v. Boxborough*, 11 Cush. 362, 364; *Holmes v. Greene*, 7 Gray, 299; *Story Conf. of Laws*, §§ 43, 46; *Concord v. Rumney*, 45 N. H. 423.

* 14 * The following authorities were referred to: *De Bonneval v. De Bonneval*, (a) *Bempde v. Johnstone*, (b) *Laneville v. Anderson*, (c) *Somerville v. Somerville*, (d) *Maltass v. Maltass*, (e) *Munro v. Munro*, (g) *Dalhousie v. M'Douall*, (h) *Johnstone v. Beattie*, (i) *La Virginie*, (k) *Munroe v. Douglas*, (l) *Craigie v. Lewin*, (m) *Whicker v. Hume*, (n) *Forbes v. Forbes*, (o) *Stanley v. Bernes*, (p) *Phillimore on Domicile*, (q) *Story's Conflict of Laws*, (r) *Bruce v. Bruce*, (s) *The Harmony*, (t) *Collier v. Rivaz*, (u) *Burton v. Fisher*. (v)

Judgment reserved.

1856. January 16.

THE LORD JUSTICE TURNER.—This is an appeal from the decision of Vice-Chancellor WOOD upon the question of the domicile of James Robert Matthews at the time of his death, the Vice-Chancellor having been of opinion that he was then domiciled in Tuscany, and the appellant contending for an English domicile.

The question, as it seems to me, must depend upon whether there was a change of Mr. Matthew's domicile in or after the year 1838, for he was born in England of * English parents, and his domicile of origin therefore was undoubtedly English; and although the domicile of origin may have been lost, and a new domicile acquired in Sweden, Spain, or Portugal, and perhaps successively in each of those countries at different periods antecedent to the year 1832, there is, I think, enough to show that the new domicile thus acquired was again lost; and the domicile of origin revived in and previous to the year 1838.

The facts of this part of the case are shortly these: Mr. Matthews was born in the year 1778: In early life he entered the Swedish military service, and he attained the rank of captain in

(a) 1 Curt. 856.

(b) 3 Ves. 198.

(c) 17 Jur. 511.

(d) 5 Ves. 750.

(e) 1 Rob. Eccl. 67.

(g) 7 Cl. & Fin. 842.

(h) *Ibid.* 817.

(i) 10 *Ibid.* 42, 139.

(k) 5 Rob. Adm. 99.

(l) 5 Madd. 379.

(v) 1 Milward (Prerog. Court of Dublin), 183.

(m) 3 Curt. 435.

(n) 13 Beav. 366.

(o) Kay, 341.

(p) 3 Hagg. Eccl. 373.

(q) Page 12.

(r) Chap. 3, § 44.

(s) 2 Bos. & Pul. 229, n.

(t) 2 Rob. Adm. 322.

(u) 2 Curt. 855.

that service. In 1810 he married in England an English lady. In 1816 he was appointed his Britannic Majesty's consul in Andalusia, and went to reside at Cadiz. He continued to hold this office and to reside at Cadiz until the year 1822, when he was appointed to be British consul-general in Portugal. He then removed to Lisbon, and held this latter office and resided at Lisbon until the year 1832, when the functions of the consulate in Portugal were suspended, and he returned to England. His office of consul-general in Portugal was abolished in the year 1833, and he then obtained a pension of 500*l.* a year from the British government, to continue until he should be re-employed in the service of the Crown. He was never so re-employed, but continued to receive his pension till the time of his death. After his return from Lisbon in the year 1832, he resided in England until the year 1838, with the exception, it would appear, of parts of the years 1836 and 1837, when he seems to have been travelling on the continent. There was here, therefore, a residence in England by Mr. Matthews during a period of about six years, interrupted only by a tour on the continent, which from the correspondence seems to have originated either in some matters connected with the education * of his children, or in the state of his health. He had * 16 not, indeed, during this period any house which could be called his own, in the sense of being his absolute property; but I collect from the evidence that, until nearly the time when he went abroad, he resided almost wholly at Bath, and that after he returned from the continent he resided principally in London; and it is clear that in the years 1836, 1837, and 1838, he had it in contemplation to purchase an estate in England. I think, therefore, that he must be taken to have made up his mind at this time that England should be his home, and to have so far carried that intention into effect as to have revived his domicile of origin, which, it is to be observed, at all times reverts with greater facility than a domicile which has been acquired.

We have to consider, then, whether Mr. Matthews afterwards abandoned his English domicile and acquired a new domicile in Tuscany, and for this purpose we must examine his movements, his acts, his motives, his family, his fortune, and his health, for all these considerations enter into or may enter into the question of his domicile.¹ All these considerations are so intimately connected together

¹ See *Lyman v. Fiske*, 17 Pick. 234, *SHAW C. J.* Upon a question of domicile,

that no just conclusion can, I think, be drawn without weighing their combined effect. The appellant's argument, indeed, rested upon the effect to be attributed to Mr. Matthews's state of health, as influencing his motives and his acts. We must deal with the subject, therefore, as a whole, and not with reference to its separate parts.

Before the year 1838, and as early, it would seem, as the year 1836, Mr. Matthews had been attacked by disease, probably of the spine, which it appears he had injured. In the month of January,

1838, his wife died at Worthing, and her death was immedi-
* 17 ately followed by * a fresh attack of his disease. Shortly

after this attack he seems to have left Worthing, and after spending some months in Bath and London, to have determined on going abroad, under the impression (as Mr. Turner, who was his solicitor and most intimate friend, has stated in his affidavit) that travelling, the baths in Germany, or a warmer climate might restore him to health. He left England in June or July, 1838, travelled in Germany till October in that year, visiting amongst other places the baths of Wildbad for the benefit of his health, and then came to Florence, where he arrived in the same month of October. After remaining about a month at Florence he went on to Rome and Naples, whence he returned to Florence in the month of April, 1839.

Upon thus returning to Florence he took up his abode at hotels for a month or five weeks, and then, on the 6th of May, 1839, he purchased a villa called the Villa Lorenzi, situate about two miles from the gates of Florence, with its furniture and contents, and with about seven or eight acres of land which were attached to it, for 2800*l*.

His correspondence with Mr. Turner from the time of his leaving England up to the time of making this purchase is, I think, of importance. He writes to him from Stuttgart on the 15th of September, 1838, as follows: "Look after some place where I can see the sun and a ripe peach or bunch of grapes. Accustomed as

the declarations of a party whose home is in controversy, made at the time of going or returning, may be received as evidence of his intention. *Gorham v. Canton*, 5 Greenl. 266; see *Thorndike v. Boston*, 1 Met. 242; *Salem v. Lynn*, 13 Met. 544; *Wilson v. Terry*, 9 Allen, 214; *Kilburn v. Bennett*, 3 Met. 199; *Wilson v. Terry*, 11 Allen, 206; *Hegeman v. Fox*, 31 Barb. 475; *Beason v. State*, 34 Miss. 602.

much to hot as cold climates, I prefer the former, as I wax old ; and must put off to the month of June next to have the pleasure of grasping your honest hand. Of course you have no chateau in view for me in England, or you would have said somewhat about it." Again he writes to him from Milan on the 16th of October, 1838, * in these terms : " I may meet a friend of * 18 mine at Bologna and stop there a while, but where I may stop you shall know, for mine is a long cruise and I may see no harbour till you hoist a signal and say to me *inveni portum*. It has rained a little here, but it is yet summer in the daytime, and the sky is much more blue than ours. On the other side of the Apennines I expect a prolongation of this sunshine, which is life to me."

On the 7th of May, 1839, the day after the date of the agreement for the purchase of the villa, he wrote to Mr. Turner in these terms : " If you write to tell me all is finished I shall stay here, where I am in treaty for a villa in the neighbourhood of this happy town. This place is not within the sphere of poetical Italy, — *Magna Grecia*, — and the climate being cooler, its productions are more similar to ours excepting figs, wine, and oil. The government is paternal and good, and fully as liberal as need be to keep people in the enjoyment of their happiness."

Immediately after purchasing the villa Lorenzi, Mr. Matthews appears to have taken up his residence there, and he continued to live there uninterruptedly down to the time of his death, with these exceptions only, that in each year up to and including the year 1845 (and as Mrs. Stephens, who lived in the house, superintended the household, and had the care of the children, in her examination states, she thinks in the year 1846 also) he came to England, and on those occasions was absent from the villa for three or four months, and except that after the year 1846, and up to and including the year 1850, he went annually to the baths either in Germany or Tuscany for some short periods of time for the benefit of his health. In the year 1840, he purchased some additional * land, about five acres, near to the villa, * 19 and which was used for the purposes of the establishment.

In the year 1844 he attempted to make a further purchase, as I presume, in that neighbourhood, but was disappointed in effecting it, and in the year 1848 he made a further purchase in the mountains of Tuscany, which Mrs. Stephens states to have been made

by him, because he enjoyed the air and because it produced oil, which was wanted for the villa. In the mean time his health had gradually declined. He had had attacks of paralysis in 1841, 1843, 1846, and 1847, and at the instance of Mrs. Stephens, on the occasion of one of his visits to England in the year 1841, he consulted Sir B. Brodie, and having accidentally met Sir Augustus West, obtained also his opinion on his case.

These opinions he communicated to Mrs. Stephens in a letter dated the 2d of September, 1841, which, so far as material, is as follows: "To please you I have consulted Sir Benjamin Brodie, who says he does not consider the attack I described to him as a decided case of paralysis, but such an attack as gouty people often have; he has ordered me a dinner pill, and a stronger in case of need, and 'pray get you gone out of this country as soon as you can and go to Florence, for our living here will soon kill you; meat, and not too much of it, once a day only.' Just as I was waiting at London Bridge Wharf to go on board, who should I see landing from Paris but an old and good friend of mine, an army physician, inspector of hospitals, Sir Augustus West. After the joy of meeting, 'But,' says he, 'you are very hoarse, have you got a cold?' 'No, I have lost my voice, and speaking is a fatigue for me:' 'Get you gone as fast as you can, you have no business here.

I feel this atmosphere already myself, I am come to see Lord * 20 Beresford, and shall return in three * or four days to my garden, my flowers, and my fruit. I'll come to see you at Florence.'"

It is remarkable that in his correspondence with his friend Mr. Turner, after the purchase of the villa, Mr. Matthews does not any further refer to any purchase in England; that in one of these letters dated the 17th of April, 1840, he calls the villa "his Winchmore Hill," referring to a house of Mr. Turner's at that place; and that in two other letters dated the 31st of July, and 29th of September, 1845, he speaks of the villa as his home; and that, on the other hand, writing to Mr. Turner on the 11th of March, 1840, he expresses himself thus: "I hope your health keeps good, mine is uncertain, as my mind is always on a spring cable looking towards England, so my old body riding in a wheelbarrow expects to be bundled out every day."

On the 2d of August, 1843, he made what has been called in the course of the argument his Tuscan codicil, and by that instrument

he describes himself as "James Robert Matthews, son of James Matthews, retired consul-general of her Britannic Majesty in Portugal, formerly captain of cavalry and at present proprietor, residing at Tuscany, and specially in Montughi jurisdiction of Fiesole community Del Pellegrino, on my own property, wishing to dispose of my substance and property which I possess or may hereafter possess in the Grand Duchy of Tuscany, and to dispose in such manner that this my particular disposal shall not have any connection with or dependence on that which I have made or may make in England or elsewhere according to the English laws, and by which I have disposed of my patrimony, giving all my children their entire and relative legal portions by a marriage settlement, dated the 16th of June, 1811, and by that taking from them and cancelling (as I do take away * and cancel) all right and * 21 power to question and dispute any intention expressed in this codicil, or to make with respect thereto any ulterior claim whatever; and in case of contravention I deprive the contravener, male or female, of all right to receive or claim whatever legacy I may have bequeathed them by my English will, by this codicil, or other prior or latter date than this. I order, command, and will as follows, by means of this my present holograph codicil, to wit, under title of legacy, privileged bequest or other better or more valid and efficacious lawful designation: I leave and bequeath to William Edgar Matthews my son a minor, he having completed his tenth year on the 13th of May, 1843, all and every of my estates personal and landed which I may have and possess in the Grand Duchy of Tuscany at the time of my death, except only the ready money which I may have in the house or at my bankers' in Florence, all which I leave to Mrs. Susanna Stephens, at present residing at my villa in Montughi, in order that she may be able to pay for my interment, which I wish to be simple and modest, and because she can provide as guardian in her better judgment for the immediate wants only of my said son William Edgar Matthews, and of my children who may be at my villa at the time of my death, excepting, moreover, the following objects;" then he makes some small disposition of trinkets in favour of his different children, and then he proceeds,— "I further impose upon my said legatee or preferential legatee (*prelegatario*) (that is, William Edgar Matthews the devisee of the Tuscan property) the following charges, to wit: 1st. To deduct annually from the rents and prod-

use of the property bequeathed the sum and quantity of 350 Florentine livres, at least to be employed in the annual expenses necessary for preserving, upholding, and ornamenting the buildings

on the said property existing in Montughi; 2d. To provide

* 22 my daughters jointly * with Mrs. Susanna Stephens, and each of them as long as they are single or unmarried or widows without children with them, lodging for their natural life in my villa at Montughi, and the use of the furniture and household goods deemed necessary, also that they may be allowed to use discreetly the enumerated property and garden for their requirements; 3d. To provide Mrs. Susanna Stephens so long as she shall remain single and unmarried lodging in my villa at Montughi, in two rooms at her choice, with use of the household plate," and various other things, and then: "The aforesaid Mrs. Susanna Stephens shall have the power of admitting into the above mentioned villa or of rejecting as resident any of my male children during the minor age or rather minority of the legatee or *prelegatario*, but no other person except the servants can be legally lodged there." And then he appoints a tutor for the administration of the shares of the legacy which is given to the son, and makes no further disposition by that paper. That paper, therefore, is confined to the disposition of the Tuscan property. Then he refers to his interment, and gives a legacy to Mrs. Stephens to be applied for his interment, which he desires to be simple and modest.

Then afterwards, on the 24th of July, 1845, he made an English will, which was executed and attested according to the English law, but not according to the law of Tuscany. I do not think it necessary to state in detail the provisions of that will. All that he does is this, he makes a particular provision in favour of several of his children, upon condition that they do not interfere with the disposition which he has made by his Tuscan codicil of the Tuscan estate. He gives by this will the bulk of his property to his youngest son William Edgar Matthews, and substitutes in the event of his death other of his younger children.

* 23 * Mr. Matthews had considerable property; he was entitled under the settlement made upon his marriage to a life-interest in about 60,000*l.* vested in the trustees of the settlement, and at the time of his death he was possessed of moneys invested in the British funds, French rents and Dutch stock, and of railway stock and railway shares in England to a considerable amount; but,

with the exception of the villa Lorenzi and the purchases he had made in Tuscany, he had no real or immovable property. He had three bankers in London, on whom he drew at Florence for such sums as he required for his establishment there, and for the allowances which he made to his children, and his expenses on their account. His papers and documents relating to his property appear also to have been kept in London by Mr. Turner, his friend and solicitor; and upon the occasion of his coming over to England in the year 1845, he deposited with Mr. Turner his English will of that date. He had a large family. The number of his children at the time of his wife's death in 1838 was eleven, but his eldest son died soon afterwards, in the year 1839. His youngest child was then only five years. His others were of ages ranging upwards to the age of twenty-four. He gave his sons, for the most part, an English education, and principally at schools in England, but some of them were at different times at schools in Germany and France.

The correspondence shows that he was much attached to this country, and was full of English feelings, and that he looked to the education of his sons in England as the source of those feelings in them. Two of them were at one time destined for the English navy. The sons, with the exception of the youngest, were but little at the villa. None of them, I believe, on more than one occasion. The youngest had gone abroad with him, and * remained with him at the villa till 1844, when he was sent * 24 to school, but returned in 1848, and was placed with an English tutor at Florence to be educated for Eton. The eldest daughter lived with him at the villa, as did the third also until she married in 1842; and the youngest daughter, upon being removed from school in 1848, came to the villa, and remained there till his death; but the second daughter resided wholly in England,

Mr. Matthews died at the villa on the 30th of July, 1850. I may add to the history of his life, that he was a Protestant, and from his correspondence evidently held in great dislike the Roman Catholic religion which prevails in the Tuscan states, that he mixed very little in society at Florence, that he took no part in public affairs, and had no business or occupation there, and that he never applied to be made a naturalized subject of Tuscany; but that, it being required by the Tuscan laws that foreigners residing in the territory should have the permission of the Government to reside there renewed every six months, he regularly

renewed this permission, and paid a Government tax upon the renewal. I think it material to state also the following passages from the examination and cross-examination of Mrs. Stephens. In her examination in chief she says, with reference to the purchase of the villa, that purchasing for the purpose of occupation is as common and prudent a mode of obtaining a residence for occupation as renting. Then she says, "Mr. Matthews's object in coming to Florence and residing there was to benefit his health; he had no other object in staying there. He frequently regretted having purchased the villa. He often said there was no country like one's own to live in. He was speaking of England when he so expressed himself. His wish was to return to England if his state of health would allow him to do so, and I think he * 25 would have done so if * he had been restored to health. His expressions of desire to return to England were made from time to time, more especially after his last attack of illness, which was in the year 1846. He frequently made them when he referred to his separation from part of his family, and more especially during the vacations of his children from school. He never mentioned Florence as the place of his adoption for his permanent residence. He never treated Florence as being his permanent place of residence." In a further part of her examination in chief she says, "He was not at all attached to the habits and modes of living of the Tuscan people, or to their opinions." In her cross-examination she states this: "It is not a common case, as far as I am aware, for persons coming to Florence to purchase land, if they come for a short time only, — some do purchase and sell again without inhabiting the property purchased, others do so after they have inhabited. Mr. Matthews treated the villa Lorenzi as his residence after he had purchased it — he treated it as his own. When he went to England from time to time, he sometimes expressed his doubt whether he should be able to return in consequence of his health; he has said, 'God knows whether I shall ever return.'" Before he purchased the villa Lorenzi, he contemplated purchasing property for a residence in England. After he purchased the villa, he never provided himself with a residence in England. I never heard him express any intention of residing again in England. He said frequently that it was a climate which he could not live in." And upon re-examination she says, "If he had recovered he might have returned to England, and I think he

would have done so; but he thought he should not recover. He never said any thing about returning to England, except in the year 1847, and when he went there from time to time. In the year 1847, when at Frankfort he regretted that he "had not sufficient * strength to continue his journey to England." * 26 Mrs. Stephens, in her examination, also refers to a patent of nobility which was granted to Mr. Matthews constituting him a noble of the town of Fiesolè. I refer to it only that it may not be supposed to have escaped attention, but I deem it to be of no importance.

The question to be determined is, what is the just conclusion as to the change of Mr. Matthews's domicile to be deduced from these facts. Questions of change of domicile depend upon the *animus* and the *factum*.¹ There is in this case no doubt as to the *factum*. That the villa Lorenzi was the home of Mr. Matthews for a long time before his death, and in the most forcible sense in which the word home can be used, seems to me to admit of no question. It was the place in which he had set up his establishment, in which his fortune, so far as his fortune admitted of locality, was centred, in which he lived with such of his children as were not at school or in the world, which he destined for their future residence, from which he went forth and to which he returned, and in which he expected to die. There is not, so far as I can see, any element wanting in this case which could tend to constitute a domicile *de facto*.²

The question, therefore, seems to me to depend wholly upon the *animus*. Did Mr. Matthews, when he purchased the villa, intend, or did he afterwards determine, to fix his residence there? What was his intention when he purchased the villa is not perhaps necessary to be determined, but the consideration of it may aid us to settle the question of his ulterior determination.

Evidence is not, I think, wanting upon this point. The letters to Mr. Turner seem to me to prove these facts. That Mr. Matthews had been desirous of possessing * some place in * 27 which he might collect his family around him. That he

¹ Story Conf. of Laws, §§ 44, 45; Harvard College v. Gore, 5 Pick. 374; Jennison v. Hapgood, 10 Pick. 77; Bulkley v. Williamstown, 3 Gray, 495; Shaw v. Shaw, 98 Mass. 158, 160; Hegeman v. Fox, 31 Barb. 475.

² These remarks are quoted with approbation in Haldane v. Eckford, L. R. 8 Eq. 641.

preferred a hot climate, and that, when he was in treaty for the purchase of this villa, he liked both the country in which it was situate and the government by which that country was ruled. When, therefore, we find him purchasing the villa, it is surely not unreasonable to suppose that he intended permanently to locate himself there.

The appellant attempted to meet this view by the evidence of Mrs. Stephens, that to purchase for the purpose of occupation was a common mode of obtaining a residence, and by referring to the letter of the 11th of March, 1840, but I think the evidence of Mrs. Stephens fails to establish what it was necessary for the appellant to make out in order to meet the point in question, for Mrs. Stephens in her cross-examination states, that it was not usual to make such purchases unless a long residence was intended, and if Mr. Matthews intended to make a long residence, and one the duration of which was not defined, I apprehend that such an intention would go far to settle the question of domicile. And with respect to the letter of the 11th of March, 1840, I think that too much importance has been attached to it. It may well have meant that although his mind had been once fixed, it was becoming unsettled again by the desire to return to England.

It is not, however, in my opinion, necessary to decide what was the intention of Mr. Matthews when he purchased the villa, for I agree with the Vice-Chancellor, that however loose and unsettled his intentions may at that time have been, his Tuscan codicil proves that at the time of its execution they had become fixed and determinate.¹ I am unable to read that instrument without being

* 28 satisfied that Mr. Matthews, when he executed * it, contemplated that he should reside at the villa until his death, and that immediately upon his death it would pass to those by whom he intended it to be occupied.

But then, it was contended on the part of the appellant—and this was the great staple of the argument on his part—that Mr. Matthews's residence out of England was a matter of necessity and not of choice. That his health compelled him to reside abroad,

¹ Residence originally temporary, and intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established. *Haldane v. Eckford*, L. R. 8 Eq. 681; *Udny v. Udny*, L. R. 1 H. L. Sc. 458; *Story Conf. of Laws*, § 45.

and that domicile cannot be founded on such a compulsory residence.

That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile may well be admitted. Such was the case put by Lord CAMPBELL in *Beattie v. Johnson*. (a) But such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other it is decided by choice.¹

In this case I find nothing in the evidence to show that Mr. Matthews, when he left England, was in any immediate danger or apprehension. He was, no doubt, out of health, and he went abroad for the purpose of trying the effect of other remedies and other climates. That he would have preferred settling in England I have little doubt, but I think he was not driven to settle in Italy by any cogent necessity. I think that in *settling * 29 there, he was exercising a preference, and not acting upon a necessity, and I cannot venture to hold that in such a case the domicile cannot be changed.

If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion.

Great reliance was placed in this part of the case upon the letter to Mrs. Stephens, announcing the opinions of Sir B. Brodie and Sir A. West; but this letter was written two years and a half after the purchase of the villa, and upwards of a year and a half after the letter of March, 1840, and, as I collect from its contents, after the attack of 1841. It was written too before the Tuscan codicil, which, I think, has an important bearing upon this part of the case also, showing, as it does, that he preferred Italy for the residence of his children. It is difficult, I think, to say that he exercised no

(a) 10 Cl. & Fin. 139.

¹ See *per* Lord WESTBURY in *Udny v. Udny*, L. R. 1 H. L. Sc. 458; JAMES V. C. in *Haldane v. Eckford*, L. R. 8 Eq. 640, 641; Story Conf. of Laws, § 46.

choice when he selected it for his own abode. I cannot, therefore, agree with the appellant's argument on this branch of the case.

Nor am I better satisfied with the remaining arguments which were urged on his behalf, founded on Mr. Matthews's English feelings, his visits to this country, his religion, his fortune, or his having kept his documents in this country. Mr. Matthews was not the less at liberty to indulge his English feelings because he had settled in Tuscany. Occasional visits to the country of a man's birth cannot, I think, be permitted to destroy the effect of a settled abode in another country. The religion was known to him at the time when he settled in Tuscany. His fortune was not of * 30 such a description as to influence * his residence. It was natural that his documents should be kept by Mr. Turner, who was not only his friend, but his solicitor. What was said by Mr. Matthews in his conversations with Mrs. Stephens is, I think, entitled to but little weight. The expressions which are let fall in the course of such conversations are so much influenced by the tone of the mind and the state of the temper at the time, that they cannot, I think, safely be relied on, and certainly cannot be weighed against a series of deliberate acts.

Looking at all the facts and circumstances of this case, my opinion upon it agrees with that of the Vice-Chancellor, and the appeal must therefore be dismissed. I believe, however, that the conclusion at which I have arrived has not the concurrence of my learned brother, and the appeal, therefore, would in any event be dismissed without costs; but we have agreed that the case is one in which it would be most proper that the costs of both parties of the appeal should be paid out of the estate. I may add that I regret the opinion which I have felt myself compelled to form, and that I should gladly have arrived at the opposite conclusion, because I more than doubt whether this question has been properly brought under the consideration of a Court, and whether, unless the differences between these parties can be amicably settled, which, I apprehend, may be done under the sanction of this Court, this decision may not necessarily open a fresh vista of litigation in the Ecclesiastical Courts, and ultimately perhaps in the Privy Council.

My opinion, however, is, that this appeal must be dismissed, but the costs of all parties be paid out of the estate.

* THE LORD JUSTICE KNIGHT BRUCE. — The decree in this * 31 cause made in the year 1854 was not made adversely. The Court that in form pronounced it seems not to have been asked to exercise any judgment on the subject, and the decree remains wholly unquestioned. It directed certain inquiries; of these a portion and only a portion has been answered by the certificate now before us, — a certificate which was approved by the Vice-Chancellor Wood, and is to this effect: [His Lordship read it.]

The appeal motion of which we have now to dispose is directed against an order of the Vice-Chancellor declining to vary this certificate, and therefore against the certificate, but substantially against so much of it only as relates to the domicile of the late Mr. Matthews; the appellant contending that Mr. Matthews was in and throughout the year 1838, and thenceforth to his death, domiciled in England; the opposing respondents that in or after the year 1839 he became domiciled in Tuscany, from the year 1843 or some earlier time, continually until his death, which happened in the year 1850.

I doubt whether the inquiry as to domicile should have been contained in the decree, considering the state of circumstances that existed when the decree was made, — a state of circumstances which seems still existing. We, however, perhaps correctly, perhaps incorrectly, thought it not incumbent on us to refuse to hear the motion argued. It was argued, and very well argued, before us. We have considered the matter, and now have, whether usefully or uselessly, to state our opinions upon it. Indeed my learned brother has already stated his.

The appeal having thus been heard by the Lords Justices without the Lord Chancellor, and the opinion of * one of the * 32 Lords Justices who heard it being for affirming the order under appeal, it will necessarily stand affirmed; and it appearing to both that the costs of the appeal on each side should be costs in the cause, they will be so; but whether (the probate before us being as it is) the orders will be efficacious beyond the matter of costs is perhaps an arguable point, one, however, not for decision at present.

Now do I think it incumbent on me to add more than two observations: one, that, after attentively reading the evidence in the cause, I am perfectly satisfied that Mr. Matthews's English domicile of origin (whether during the whole of his life before the year

1838 it had continued or not continued uninterruptedly his domicile) was his domicile in and throughout that year; the other, that, the whole of the evidence being considered, it does not appear to me to be proved that at any time after the year 1838 Mr. Matthews acquired a Tuscan domicile, or relinquished or lost his English domicile, or intended to acquire a Tuscan domicile, or to relinquish or lose his English domicile.

It is not, however, likely that I should in any instance, and certainly I do not in the present instance, feel confident as to the accuracy of a conclusion differing from the concurrent opinions of my learned brother and the Vice-Chancellor WOOD.

* 33 * DAVIS v. THE EARL OF DYSART.

1856. January 25, 26. Before the LORDS JUSTICES.

On the taxation of the plaintiff's bill of costs (in a suit in which a bill for the production of title-deeds had been dismissed) the Master allowed charges for the settlement of the answer by the defendant's junior equity counsel and by his conveyancing counsel, who was familiar with the defendant's title, and also allowed a charge for an abstract of title laid before the junior equity counsel for the purpose of preparing the answer, but which abstract did not appear to have been prepared entirely for that purpose: *Held*, that these allowances ought not to have been made.¹

THIS was an appeal from the decision of the Master of the Rolls (reported in the twenty-first volume of Mr. Beavan's Reports (a) on appeal from the taxing master, who had allowed a charge for the preparation of an abstract of title as instructions for the answer, and had also allowed the fees paid to two junior counsel (one being a conveyancer) for settling the answer. The Master of the Rolls had disallowed these charges. The facts of the case are fully stated in Mr. Beavan's report.

The defendant's solicitor stated, *vidé voce*, on the appeal, in answer to questions from the Court, that it could not be ascertained how much of the abstract in question had been actually prepared before the institution of the suit.

(a) Page 124.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1440, n. (2).

Mr. Lloyd and Mr. Tripp, in support of the appeal. — Under the 120th Order of May, 1845, the costs of preparing the abstract ought to have been allowed. If the usual charge for copies of it had been made they would have been allowed, and would have amounted to more with regard to the costs of the conveyancing counsel; the title of the defendant was voluminous and complicated, and it was necessary or was the least expensive course for the conveyancer, who had been in the habit of advising on it, to assist in preparing the answer, for which otherwise much longer and more expensive instructions must have been given * and much more time and labour would have been required. * 34 site.

Mr. Roundell Palmer and Mr. Jessel, for the respondent. — The Order of 1845 does not apply to abstracts, which require skill and care in their preparation, and are more expensive than mere copying; moreover, it does not appear that the abstract was made for the purposes of the suit. As to the answer being settled by two counsel, that is never considered necessary and cannot be allowed in costs.

They referred to *Attorney-General v. Munro*. (a)

Mr. Tripp, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — What we might have thought it right to do if the abstract had been made after the commencement of the suit and solely for the purpose of the suit, or if there had been evidence pointing out what portion, if any, of the abstract had been so made, it is not necessary to say, for it is clear that some progress had been made in the composition of the abstract before the suit, and the defendant's solicitor has not furnished the Court with any evidence to show what portion of it, if any, had been composed solely for the purposes of the suit. The Master of the Rolls having in his examination of the bill allowed the defendant for one copy of the whole abstract, I think it impossible in this state of the evidence to depart from his Honor's decision.

Considerations not dissimilar to these apply to the assistance given by Mr. Measure, the conveyancing counsel, to the defendant. It is plain that Mr. Measure had advised on the title before the suit, and therefore, when the suit commenced, the defendant had the advantage of that advice. It is unnecessary to say how the case would have stood if that advice and opinion had not been given before the suit was commenced. The state of things being as it was, looking at the nature of the demand made by the suit, I cannot but think that the assistance of *Mr. Tripp* in framing and settling the answer was by itself amply sufficient, and that it would not be safe to depart from the course taken by the Master of the Rolls.

Having regard, however, to the subject of the disallowance and to the apparent hardship on the defendant, I think that we may dismiss the appeal without costs.

THE LORD JUSTICE TURNER.—I am also of opinion that we ought not to disturb the decision of the Master of the Rolls. The questions are two,—whether the defendant was entitled to the costs of preparing the abstract, and whether he was entitled to the costs of two counsel for the preparation of the answer. The 120th Order of May, 1845, was framed with a view to enable the Court to give a defendant the costs incurred in his defence. The abstract here in question, however, was not prepared for the purpose of the defence. It is consequently not necessary to give an opinion, whether the costs of preparing an abstract could in any case be allowed under the 120th Order. I doubt, however, whether any thing could be allowed under it except as costs of copies. As to the other point I agree also with my learned brother, that the costs of the conveyancing counsel could not be allowed, an experienced equity draftsman was perfectly competent to settle an answer in such a case without the assistance of a conveyancer. The appeal must be dismissed, but without costs.

* BULKELEY v. HOPE.

* 36

1856. January 14, 15, 31. Before the LORDS JUSTICES.

Where the facts and questions stated on a special case were such as did not enable the Court to determine the rights of the parties: *Held*, that the proper course was to discharge the order made below on the case without prejudice to any question.

It is not a proper use of the Act of Parliament to come to the Court for its opinion on a partial or garbled statement of facts.

THIS was an appeal from the decision of Vice-Chancellor WOOD, reported in the 1st volume of Messrs. Kay & Johnson's Reports. (a)

The course which the case took on the appeal is sufficiently explained by the judgments.

Mr. Karlake was for the appellants.

Mr. Elmsley and *Mr. Giffard*, for the respondents.

Judgment reserved.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the facts stated in this special case it appears to me at least very probable that neither of the purchases before us, whether completed or not completed, is binding in equity on either side, that is to say, it is, in my judgment, likely in a high degree, if not certain, that none of the purchasers can in equity insist on having any part of the purchased lands discharged or exonerated from land tax on the ground that he contracted for the purchase of property free from land tax; and that, on the other hand, the vendors cannot in equity insist upon holding any of the purchasers to his purchase as a purchase of land subject to land tax.

* In such a state of things it does not appear to me safe * 37 or right that the special case, framed as it is, and propounding only the questions that it does propound, should be answered at all. I am of opinion that the order already made on the case

should be discharged without prejudice to any question, and that also, without prejudice to any question, the court should decline making any other order.

THE LORD JUSTICE TURNER. — I have considered this case, and have formed my opinion upon both the questions which are raised by it. I find, however, that the opinion which I have formed would not finally settle the questions between these parties, and in this state of circumstances I think that it would not be right for me to state the conclusions at which I have arrived, as an opinion now given upon questions which would not determine the rights of the parties might prejudice the discussion of those rights when properly brought before the Court for its determination. I regret this result, but it arises from the fault of the parties in having submitted to the Court some only of the questions on which their rights depend; and I think it right to add, that, although I have desired and endeavoured to decide this case, I think the parties entitled to but little indulgence, as from what transpired during the argument it is plain that this record does not truly represent the facts of the case as they actually stand. I certainly shall not be disposed on any future occasion of the like nature to take the trouble which I have taken in this case. Parties must understand that if they desire to have the opinion of the Court under this Act of Parliament they must make a fair use of it, and not come to the Court for its opinion upon a partial or garbled statement of the facts.

* 38 * The order must be to discharge the Vice-Chancellor's order, without prejudice to any question, and in lieu thereof to substitute the following order: "This Court does not think fit to make any order upon this case."

THE ATTORNEY-GENERAL *v.* ST. CROSS HOSPITAL.

1855. July 4. 1856. January 31. Before the LORDS JUSTICES, Mr. Justice WIGHTMAN and Mr. Justice ERLE.

By a deed of 1446, a rectory was granted as part of an endowment for an almshouse within the precinct of a hospital, already endowed and having a chapel

attached to it, reserving to the grantor a right (which was never exercised) of instituting a perpetual vicar of the rectory. By a private Act of 18th Elizabeth it was enacted, that the master of the hospital should not aliene the hospital nor the tithes of the rectory (which was described as adjoining the hospital), but that the church, house, and hereditaments belonging to the hospital should be held by the master and brethren thereof for charitable uses. The parish church of the rectory had been pulled down at a time which could not be ascertained, and the parishioners had used the chapel of the hospital, in which the baptisms, marriages, and burials of the parishioners had been for a long series of years performed. In a suit to carry into effect the trusts of the hospital a receiver had been appointed. Upon a motion of the churchwarden of the parish, that he might, notwithstanding the appointment of a receiver, be at liberty to perform the duties of churchwarden in the chapel as the church of the parish, or might be examined *pro interesse suo* : —

Held, that a union of the parish with the hospital could not be presumed, and that the churchwarden had no right to interfere with the chapel.

Semble, that there is no precedent or principle for the union of the mastership of a hospital with the rectory of a parish.

Semble, that if such union could be presumed from custom, a custom which was not shown to extend to the interference of the churchwarden of the parish with the chapel, would not lead to a presumption of a union authorizing such interference.

A churchwarden has no power to provide for the service of his church during vacancy.

THIS was an appeal from a decision of the Master of the Rolls, dismissing or refusing to make an order upon a petition presented by the Rev. Henry Holloway, churchwarden of the parish of St. Faith near Winchester. The petition prayed that, notwithstanding the proceedings in the above cause, in which a receiver had been appointed, the petitioner might be at liberty to perform, in the chapel of the hospital of St. Cross, certain duties as churchwarden of the parish of St. Faith, of which the petitioner insisted the chapel in question was the parish church; or, that the petitioner might be examined *pro interesse suo*. It also prayed that an *order of the Master of the Rolls restraining the *39 petitioner from interfering with the chapel might be discharged.

The facts relating to the foundation of the hospital of St. Cross, and the almshouse of Noble Poverty will be found fully stated in the reports of the above case in Mr. Beavan's Reports. (a)

(a) 17 Beav. 435; 18 Beav. 475, 601.

The following are those most material for the purpose of the present report : —

By a charter dated in 1151 (the original of which was not in existence, but was referred to in the register of the Bishop of Winchester, in 1200), Henry de Blois, Bishop of Winchester, and brother of King Stephen, committed to the guardianship and administration of the master and brethren of the hospital of St. John of Jerusalem the hospital of the Poor of Christ, or St. Cross, or Holy Cross, which was founded at an earlier period, without the walls of Winchester, but which he had just founded anew, for the support, maintenance, lodging, and clothing of thirteen poor men who should reside there permanently.

By an indenture dated the 3d of January, 1445, reciting that by the license of King Henry VI., and with the consent of the master and brethren of the hospital of St. Cross, Cardinal Beaufort, Bishop of Winchester, had founded within its precincts an almshouse, called the "Almshouse of Noble Poverty," consisting of two priests, thirty-five brethren, and three sisters, under the rule and government of the master of the hospital of St. Cross,
 * 40 according to certain statutes and ordinances, and * had given the master and brethren many possessions, for the better performance by them of certain works of piety annually, as was more fully expressed in a certain indenture made between him and them, and dated the 4th of February then last past, to provide against any casual diminution or dilapidation of those possessions, it was witnessed that the cardinal, by the deed now in statement, granted to the master and brethren the parish church of Crundall.

By a charter dated the 24th of July, 1446, made by Cardinal Beaufort, after reciting the foundation of the almshouse of Noble Poverty within the precinct of the hospital of St. Cross, with the assent of the master and brethren of that hospital, under the rule of the said master, and after reciting the appropriation of the parish church at Crundall to the hospital, it was witnessed, that the cardinal thereby granted, united, connected, and incorporated the church of St. Faith, a hospital called the hospital of St. John, and certain free chapels, to and with the master and brethren of St. Cross and their successors, reserving to the grantor his episcopal rights, synodals and Peter-pence, and the right of institution and induction of a perpetual vicar in the church of St. Faith, but which right appeared never to have been exercised.

It appeared that the parish church of St. Faith had been pulled down some time in the sixteenth century, and that no parish church having been rebuilt, the inhabitants of the parish had been accustomed to use the church or chapel of the hospital of St. Cross, and to attend divine service there, and that the rites of marriage and burial had been there performed.

By a private Act of Parliament, of the 18th of Elizabeth, some leases of the house and premises of the hospital * were * 41 annulled, and it was enacted, that neither the then present nor any future master or brethren should aliene or lease either the mansion-house of the hospital, or the tithes of the parish of St. Faith, "adjoining to the hospital," or other premises there mentioned; but that the same, and every parcel thereof, might always remain in the proper hands and occupation of the master and brethren, for the maintenance of hospitality and relief of the hospital, and that the church and house, and the manors, lands, tenements, and hereditaments whatever of right appertaining, or belonging, or accepted, or reputed, or esteemed to be belonging, or in any wise appertaining to the same house or hospital, should for ever remain the possession and inheritance of the hospital, and that the master and brethren should for ever hold and enjoy the said church, house, manor, land, parsonages, tithes, and other the premises for ever, to be employed to the charitable uses therein mentioned.

In 1851, the petitioner obtained a mandamus, directing the parishioners to elect a churchwarden of the parish of St. Faith, and was himself elected churchwarden for the year 1853.

On the 1st of August in that year an order was made in the above cause, directing that a receiver should be appointed to get in the rents and profits of the property of the hospital of St. Cross, and of the almshouse of Noble Poverty, and to let and manage the property, and to exercise all such rights, powers, and privileges as might be essential for the purposes aforesaid, and for the good of the charity.

A receiver was appointed accordingly, and afterwards, on the 7th of May, 1854, Mr. Holloway, who had given * previous * 42 notice of his intention of so doing, attended in the chapel of the hospital, and when the deputy of the chaplain, appointed by the master, came into the chapel to perform divine service, Mr. Holloway requested him to produce his license from the bishop to

act as curate. He replied, he had no such license, but a mere authority from the bishop to act in the chaplain's absence. Mr. Holloway, then professing to act as churchwarden of St. Faith, prevented the deputy from performing the duty and performed it himself.

A motion was then made before the Master of the Rolls on behalf of the Attorney-General, that Mr. Holloway might be restrained by injunction from interrupting or interfering with the performance of divine worship in the chapel of St. Cross, and from performing, or attempting to perform, divine service in the chapel.

His Honor, on the 14th of June, 1854, made an order upon this motion, (a) directing that Mr. Holloway should be restrained from interfering or interrupting the performance of divine worship in the chapel of St. Cross, and from himself performing, or attempting to perform, divine service in the said chapel, and from in any manner interfering with the said chapel, or the furniture thereof, until the Court should further order; but Mr. Holloway was to be at liberty to take any proceedings in any Court he might be advised, to try the question raised by him, or to establish any rights claimed by him as churchwarden of the parish of St. Faith.

Mr. Holloway then presented the present petition, stating among other things, as circumstances from which the union of the * 43 mastership of St. Cross with the parish * of St. Faith might be presumed, the following facts: That in 1291, the mastership was rated as an ecclesiastical benefice by Pope Nicholas IV. That in 1349, William Edgington, Bishop of Winchester, collated his nephew to the mastership as a benefice, without cure of souls. That in 1362, William de Stowell, the then master, exchanged the mastership, with the assent of the Bishop of Winchester, for the rectory of Berghelere, and that in 1370, another similar exchange had taken place. That in 1507, Richard Fox, then Bishop of Winchester, caused the parish church of St. Faith to be pulled down, and the font and bell to be removed to the chapel of St. Cross, and that that chapel had ever since been used as the parish church of St. Faith. That in the reign of Henry VIII. the mastership of St. Cross was valued as an ecclesiastical benefice, and rated as subject to payments of tenths, but that it was exempted from pay-

ment of first fruits in the reign of Queen Elizabeth, as being founded for charitable purposes. That in 1580, John Watson, Bishop of Winchester, held the mastership *in commendam*. That in 1627, the King presented William Lewis to the mastership, the see of Winchester being vacant. That in 1669, Henry Compton was presented to the mastership by the executors of the then late Archbishop of Canterbury, who took it under his option, was canonically instituted thereto. That in 1728 and 1776, John Lynch and Beilby Porteous were presented to the mastership under similar circumstances. That in 1778, on Dr. Porteous becoming Bishop of London, Dr. John Lockman was canonically instituted and inducted on the presentation of King George III., as master and guardian of the hospital of St. Cross, with the rectory of St. Faith united. That from the time when the church was pulled down until now the chapel of St. Cross had been used as the parish church of St. Faith. That marriages, churchings, * christenings, and burials of parishioners of St. Faith had been performed there, and in the churchyard adjoining. That monuments were affixed to the walls of the chapel; and that before the Act came into operation abolishing notices in churches, such notices were published in the chapel. That the master or the chaplain appointed by him, had performed in the chapel the services of the church, and received the fees for the performance of rites for the parishioners of St. Faith; that the registers earlier than 1676 were destroyed, but that in the registry of that year was an entry beginning thus: "This register of the parish of St. Faith was bought, September 10, 1676. The hospital of St. Cross hath also its share in this book," and that this entry was signed by the master and the chaplain, and by persons described the "churchwardens of St. Faith."

The petition prayed that the order for the injunction of the 14th of June, 1854, might be discharged, and that, notwithstanding the decree, the petitioner might be at liberty to perform his duties as churchwarden, or that he might be examined *pro interesse suo* touching his claim,

On the 20th of December, 1854, the petitioner appeared in person before the Master of the Rolls in support of the petition, but his Honor considered that it was in effect as an application to rehear the former order, and his Honor made the order under appeal, which had not been formally drawn up, but which appeared by the

Court book of the day to have been an order dismissing the petition. It was arranged that the appeal should extend to the order for an injunction, and should be heard by their Lordships after Trinity term. There was some difference as to the terms of the order upon the petition, which, however, it became * 45 immaterial to consider, * the case being agreed to be argued as substantially an appeal from the order granting the injunction. Their Lordships suggested that the case should be heard with the assistance of two Judges. It was further arranged that the points for decision should be the following :—

1. Whether on the 7th day of May, 1854, the petitioner was churchwarden of the parish of St. Faith.

2. Whether on the said 7th day of May, 1854, the petitioner could lawfully exercise the office of churchwarden within the church or chapel of St. Cross.

3. Whether the acts done by the petitioner on the 7th day of May, 1854, from the repetition of which he has been restrained by the Order of the 14th day of June, 1854, were done by him in the lawful exercise of his duties as churchwarden of the parish of St. Faith.

July 4. Before the LORDS JUSTICES, Mr. Justice WIGHTMAN and Mr. Justice ERLE.

The case now came on to be argued.

Mr. Baggallay, in support of the petition.—As to the first question, Mr. Holloway was duly elected churchwarden, and by the 118th canon continues to fill that office till the appointment of a successor.

On the second question, the building called the chapel of St. Cross, having regard to the services performed in it, falls within no other description of ecclesiastical building than that of the parish church of St. Faith or of a parochial chapel of ease of that parish, either of which descriptions would entitle Mr. Holloway to act as churchwarden within it. It clearly was not a proprietary chapel, no such chapels being known when it was founded.

It was not a free chapel, for it was subject to the jurisdiction * 46 tion * of the bishop, nor was it a private chapel, for it was

open to all the parishioners, and marriages, baptisms, and burials took place there, which prove it to have been a parish church. (a) From the evidence, a union of the hospital with the parish must be presumed. From the time when the rectory was granted to the hospital, there has been no presentation either to it or to the vicarage, and there has consequently been no incumbent of the living, unless the master of the hospital, who has always been an ecclesiastical person, fills that character. It is clear that the hospital has been always treated as an ecclesiastical benefice since the grant of the rectory. That is sufficient to authorize its union with another benefice. Unions are not confined to parishes. In *Selden on Tithes* (b) an instance is given of the union of two parishes with a hospital. It is true that a grant from the Crown was in that case obtained, but it was not necessary: *Austen v. Twyne*; (c) nor is it necessary to prove a deed of annexation. *Attorney-General v. Brereton*, (d) *Hartley v. Cook*. (e)

As to the third question, Mr. Holloway's acts as churchwarden were lawful; as churchwarden Mr. Holloway was entitled and bound to provide for the service of the church.

The Solicitor-General, Dr. Bayford, and Mr. W. M. James, for the Attorney-General. — The circumstances relied upon as evidence of a union can all be explained, without supposing a union. A bull of Pope Clement III. of 19th March, 1187, before the grant of the rectory, recognizes the right of * burial * 47 in the hospital, and directs that divine service may be celebrated in the chapel, and that the prior of the hospital of Jerusalem may present priests to the bishop. These privileges are confirmed by a charter of Richard I., dated the 16th September, 1189. In 1291, a taxation of Pope Nicholas shows, that the hospital and the parish were then distinct. The grant of the rectory in 1446 was to the almshouse of Noble Poverty and not to the hospital of St. Cross, and it was not competent to the latter charity, even if the rectory had been granted to itself, to give up, in consideration of the grant, its chapel to be used as the parish church. It would have been a breach of trust to consent on behalf of the hospital to a union with the parish, and therefore no such union

(a) 2 Inst. 363, n. (31).

(d) 2 Ves. Sen. 424.

(b) Page 267.

(e) 9 Bing. 728.

(c) Cro. Eliz. 501.

can be presumed to have taken place, even if it had been practicable. But a union of a parish with the private chapel of a hospital could not have been effected under the common law or any statute. The Statute of Elizabeth, however, is conclusive; and it moreover speaks of the hospital as adjoining and not in the parish of St. Faith.

Even if Mr. Holloway had a right to act as churchwarden in the chapel, that right would not have extended to enable him to perform the duty or to prevent the deputy chaplain from officiating. *Hutchins v. Denziloe*. (a) His interference was illegal and amounted to brawling. *Gates v. Chambers*, (b) *Cox v. Goodday*. (c)

Mr. R. Palmer and *Mr. Hobhouse*, for the hospital.

Mr. Baggallay, in reply.

Judgment reserved.

January 31.

* 48 * The Judges forwarded to the Lords Justices their opinion in writing, which was as follows:

To the first question, whether on the 7th of May, 1854, the petitioner was churchwarden of the parish of St. Faith, our answer is in the affirmative. Upon this point there has been no dispute.

To the second question, whether on the said 7th of May, 1854, the petitioner could lawfully exercise the office of churchwarden within the church or chapel of St. Cross, our answer is in the negative.

The chapel of the hospital is supposed by the petitioner to have become the parish church of St. Faith by an Act of union uniting the benefice of the parish, either with the hospital or the mastership thereof, and as no record of any such Act has been found, he contends that its existence ought to be inferred from the facts adduced in evidence; namely, that the inhabitants of St. Faith have in some instances made the same use of the chapel which they would have made of their parish church,—some marriages, baptisms, and burials have been there performed for inhabitants

(a) 1 Hagg. Consist. 170. (b) 2 Add. 177. (c) 2 Hagg. Consist. 138.

of St. Faith, some parochial notices have been there given out, the expense of a register book has been borne jointly by the hospital and the parish, and if the chapel is not the parish church the parishioners have none; he also alleges that in the admission and institution of Dr. Lockman, the predecessor of Lord Guildford, the benefice is named the Mastership of St. Cross with the rectory of St. Faith united.

And he further alleges a tradition, that the parish church of St. Faith had been demolished in the beginning of the sixteenth century, and that the font and bells * had been trans- * 49
ferred to the chapel of St. Cross, and also a conjecture that the benefices had been united under Bishop Fox.

We have considered these facts in conjunction with the documents relating to the appropriation of the parish to the hospital, and are of opinion that they afford no evidence of such an union as would make the chapel to be the parish church.

The appropriation of the parish of St. Faith to the hospital of St. Cross was made by Cardinal Beaufort, in the course of proceedings intended for the endowment of the almshouse of Noble Poverty, by a deed dated the 24th of July, 1446, which recites the foundation of the almshouse of Noble Poverty within the precinct of the hospital of St. Cross, with the consent of the master and brethren of that hospital, under the rule of the said master, and the appropriating of the parish church of Crondall to the said hospital upon certain trusts contained in certain indentures, and the insufficiency of the existing endowment for the performance of those trusts, and then grants, unites, connects, and incorporates the church of St. Faith, the hospital of St. John, in Fordingbridge, and certain free chapels, to the master and brethren of the hospital aforesaid, and their successors, reserving to himself the power of instituting a perpetual vicar in the aforesaid church of St. Faith, and assigning to the said vicar for ever a fit portion of the fruits of the aforesaid church of St. Faith.

By this deed it is clear that the rectory of St. Faith became united and appropriated to the hospital of St. Cross upon certain trusts, and that the chapel of the hospital did not thereby become the church of the parish. The right reserved of endowing a vicarage out of the * rectory appears never to have been * 50
exercised, and the appropriation must therefore be considered to have been in that class where the religious house per-

formed the duties of the church by its own members or stipendiary curates. But, although the parishioners of St. Faith may have suffered grievous deprivation by this appropriation, they did not on that account acquire any right to the chapel of the hospital; nor could any grant of Cardinal Beaufort, to a hospital founded by Henry de Blois, impair the right of that hospital to their chapel, or any other property derived from their founder. The documents which follow this grant indicate that there was some imperfection in the endowment intended by Cardinal Beaufort: we refer to the letters-patent of Henry VI. of the 8th of April, 1455, licensing the executors of Cardinal Beaufort to incorporate the almshouse of Noble Poverty, and to the grant dated the 9th of May, 1455, of property derived from Cardinal Beaufort by the master and brethren of St. Cross to the Bishop of Winchester, and to the charter of the King to the bishop in 1455, and to the grant of the bishop, in 1460, of property derived from Cardinal Beaufort to a rector, and chaplains, brethren and sisters, and particularly to the grant by William of Waynflete, dated the 11th of August, 1486 (2 Hen. 7), which recites, that by the craft of succeeding persons the lordships and possessions given by Cardinal Beaufort were taken from the hospital and occupied by the power of noble persons, and then establishes one chaplain and two brethren to pray for the soul of the founder according to his intention, who were to be supported by the fruits of the ecclesiastical benefices that yet remained.

Between this time and the reign of Elizabeth the distinction between the property derived from Henry de Blois and that * 51 derived from Cardinal Beaufort, and also * the distinction between the purposes of the two foundations, seems to have disappeared, for the name of the benefice is varied in several collations. Thus, in 1524, the collation recites that the hospital of the Holy Cross was vacant, and confers upon John Incent the mastership or warden of the said hospital or almshouse.

In 1545 the collation confers the custody of the hospital or almshouse of St. Cross, then vacant by the death of John Incent, together with the church of St. Faith, having peculiar jurisdiction, and by sufficient authority united and annexed to the said hospital, on William Medowe.

On the 14th of June, 1557, the collation confers the hospital of St. Cross on John Leffe, vacant by the death of William Medowe,

and he was instituted master or warden of the said hospital, or house of Noble Poverty, with all its rights.

On the 24th of August, 1557, the collation conferred the hospital, or house of Noble Poverty of St. Cross, on Dr. Robert Raynolds; and, in the 4th Elizabeth, 1561, Dr. Watson, who succeeded Dr. Raynolds, was sued in the exchequer as "warden or master of the house or hospital of the Holy Cross without the walls of the city of Winchester," for the first fruits and tenths of that hospital; and he claimed to be within an exemption in the statute of Elizabeth, on which the suit was brought, in favour of hospitals founded and used, and whose possessions were employed for, the relief of the poor, and the exemption was allowed by the Court upon the certificate of the bishop that the fact was so.

And, in the 18th of Elizabeth, a private Act was passed, by the first section whereof certain leases of the house * and * 52 premises of the hospital, made by Dr. Raynolds to one Cleverly, were annulled; and, by subsequent sections, it was enacted, that neither the present, nor any future master or brethren, shall aliene or lease either the mansion house of the said hospital or the tithes of the parish of St. Faith adjoining to the said hospital, or other premises there mentioned. But that the same, and every parcel thereof, may always remain in the proper hands and occupation of the master and brethren for the maintenance of hospitality and relief of the said hospital. And that the church and house, and the manors, lands, tenements, and hereditaments whatever, of right appertaining or belonging, or accepted or reputed or esteemed to be belonging, or in any wise appertaining to the same house or hospital, shall for ever remain the possession and inheritance of the said hospital, and that the master and brethren shall for ever hold and enjoy the said church, house, manor, land, parsonages, tithes, and other the premises, for ever to be employed to charitable uses, with the usual saving clause.

This statute appears to us to negative conclusively the supposition that there had been any union of the rectory of St. Faith with the benefice of the mastership of the hospital.

The parsonage of St. Faith, according to our construction, is enacted and declared to be the property of the master and brethren

ren without power of alienation, and if any imperfections had been found to exist in the title derived from Cardinal Beaufort, this statute would operate in some degree to confirm that title, and so would confirm the appropriation of St. Faith to the hospital made by him. As this appropriation without a vicarage left the inhabitants unprovided with spiritual aid, it would be

* 53 reasonable that the hospital taking the temporal profits * dedicated to spiritual purposes from the parish of St. Faith, should permit the inhabitants of that parish to use the chapel as might be required; and the regulation of Bishop Hoadley, in 1744, states that the fact was so. That bishop, when directing some alterations in the *consuetudinarium* as to the times for divine worship, assigns as one of his reasons for the change, that the inhabitants of the parish of St. Faith, the village of St. Cross, and the hundred of Sparkford, who are now more numerous than when the existing customs were established, have no other place to resort to for public worship but the said chapel, and are permitted to attend there for divine offices.

Upon this review, we are of opinion that the master and brethren of the hospital are entitled to the rectory of St. Faith by the appropriation of Cardinal Beaufort, confirmed by the statute of the 18th of Elizabeth, and that there is no evidence of any other union or consolidation of the benefice of St. Faith with any other benefice, and that the user of the chapel by the inhabitants is accounted for by this appropriation, and that the collation of Dr. Lockman to the mastership, with the rectory of St. Faith united, operated to confer the mastership, and no more, and that the tradition in respect of Bishop Fox is of no legal weight.

This view of the facts of the case supports our answer in the negative to this question, and renders it unnecessary to discuss the legal questions which would arise if the supposed union was presumed from the facts.

We only add that we are not aware of any legal mode by which the bishop and the master could affect the property of the master and brethren in their chapel, and moreover that we find no

* 54 precedent and no principle * which would authorize the union of the mastership of a hospital, where the duty is to attend to the bodily wants of the poor inmates, with the rectory of a parish, where the duty is to attend to the cure of the souls of the

parishioners. On turning to the passage in Selden on Tithes, (a) which was cited as a precedent for a similar union, where Henry III. granted to the Bishop of Chichester that a church may be demolished (*“ Et prædicti duo parochiani qui spectabant ad ipsam assignentur hospitali beatæ Mariæ in perpetuum et ibi deinceps recipiant spiritualia ”*), we find that the author is not treating of the union or consolidation of existing benefices, but of the original formation of parishes; and although they were for the most part formed by the laity in dedicating their tithes, yet, he says, other powers occasionally interfered in this formation, and he gives an instance of the pope interfering, to direct that a parish should be divided into two parishes, and also an instance of a king interfering, to make a combination by the grant above stated.

To the third question, whether the acts done by the petitioner on the 7th of August, 1854, from the repetition of which he has been restrained by the order of the 14th of July, were done by him in the lawful exercise of his duties as churchwarden of the parish of St. Faith, our answer is in the negative.

If the chapel of the hospital was not the parish church of St. Faith, as supposed in our last answer, the petitioner had no right to do any act there as churchwarden of St. Faith.

If the union of the parish with the mastership be inferred * from the facts, for the purpose of argument, the terms of * 55 the union must also be inferred from the facts; and as the churchwarden of St. Faith is not shown to have ever acted in that capacity in the chapel, the legal inference would be that the union did not give him any right there. If the question be confined to the nature of the acts, whether they are such as a churchwarden is authorized to do in an ordinary parish church in a time of vacancy, our answer is that we know of no right for the churchwarden either to perform or procure performance of divine service during vacancy. The usual course is well known for churchwardens, acting under a sequestration granted by the bishop, to provide for the service of the church; but in so doing they act, not as churchwardens, but as the officers of the bishop.

As to the other acts of the petitioner referred to in the question, they would appear to us to be lawful if under the condition above mentioned.

January 31.

Their Lordships on this day delivered the following judgments: —

THE LORD JUSTICE KNIGHT BRUCE. — In this case the order which substantially and in effect, though probably not in a manner altogether regular, is under appeal before us was made at the rolls on the 14th of June, 1854, in these terms: [His Lordship read it to the effect above set out.]

The appellant here is Mr. Holloway. The occasion of the order was thus: —

* 56 The decree in the cause made at the rolls on the 1st * of August, 1853, contained among other matters the following: “ His Honor doth declare that the hospital of St. Cross, in the parish of St. Faith, near to the city of Winchester, was founded by Henry de Blois, brother to King Stephen, and Bishop of Winchester, by charter made in or about the year 1157, for the purpose of charity, and that the almshouse of Noble Poverty founded by Cardinal Beaufort, brother of King Henry, by the indenture dated the 3d of January, 1445, in the pleadings mentioned, was and is a charity in itself, and is distinct from the charity of the said hospital of St. Cross, and that the estates and property of the said hospital and almshouse ought to be applied for the purposes of charity, according to the dispositions of the respective founders. And this Court doth order that a scheme be settled for the future management of the said charities; and in settling such scheme, it is ordered, that regard be had to the respective foundations, so far as they appear, of the hospital of St. Cross and the almshouse of the Noble Poverty: And it is ordered, that an injunction be awarded to restrain the defendants, the master, and the brethren, and the said Francis Earl of Guilford, from making any further leases of any part of the possessions, hereditaments, and property, and from renewing any subsisting leases of any part thereof upon fines, and from taking or receiving any sums in respect of such fines, or in respect of any fines to be taken upon any grants by copy of court roll of any of the said manors, or of any part of the said lands, possessions, and property; and also to restrain the said defendants from receiving any part of the rents and profits and income of or arising from any part of the said lands, heredita-

ments, and possessions belonging to the said hospital or to the said almshouse of Noble Poverty : And it is ordered, that some proper person be appointed to receive and get in the rents, issues, and profits of all the said hereditaments, possessions, and property * belonging to both the said charities, and to let and * 57 manage the same, and to hold the courts of any manors, or manor, part thereof, and to exercise all such rights, powers, and privileges as may be essential for the purposes aforesaid and for the good of the said charities respectively ; and the tenants of the said possessions and property are to attorn and pay their rents in arrear and growing rents to such receiver."

Under this decree a receiver was appointed.

There is a building in Hampshire used as a place of worship according to the Anglican forms and doctrines, which some persons consider to be the parish church of St. Faith mentioned in the decree and order, and others to be not a parish church at all, but merely a private chapel belonging to the charities, or one of the charities, the subject of the decree, and accordingly within and under the receivership. The Attorney-General and the receiver took and take the latter view ; Mr. Holloway, who has been and perhaps still is the churchwarden or one of the churchwardens of the parish of St. Faith, the other. In accordance with which he, being churchwarden of St. Faith at the time, proceeded and acted in such a manner as directly and wrongfully to interfere with the receiver and his functions and obstruct them, if the informant's and the receiver's views of the description and nature and appropriation of the building were right and those of Mr. Holloway wrong.

The consequence was, the motion which produced the order that I have mentioned, the order substantially under appeal.

After the order, Mr. Holloway presented at the rolls * a * 58 petition upon the subject, containing allegations of sufficient length and volume (I do not say too long or too voluminous), and praying thus : — " Your petitioner therefore humbly prays your Honor, that the aforesaid order of the 14th of June, 1854, may be discharged ; and that, notwithstanding the aforesaid decree of the 1st August, 1853, your petitioner may be at liberty to perform all and every his duties as such churchwarden as aforesaid at the parish of St. Faith as well in the said chapel in the said hospital of St. Cross and the church-yard or burial-ground

thereunto adjoining as elsewhere ; or otherwise that your petitioner may be examined *pro interesse suo* touching the claim made by your petitioner as such churchwarden as aforesaid ; and that the above-named plaintiffs, or, if necessary or proper, the above-named defendants, may be ordered, within such time as to your Honor shall seem fit, to exhibit interrogatories for the purpose of such examination, or that you will be pleased to make such further or other order in the premises as to your Honor shall seem meet and proper."

When this petition was brought before the Master of the Rolls, his Honor, as I understand, declined in effect to hear it, on the ground that the subject-matter of it had been fully considered by him upon the motion, and that the controversy had better be taken at once before the Lord Chancellor or ourselves. Whether his Honor dismissed the petition I am not sure ; but what was done was much, I believe, to that effect. In consequence, whether by an appeal petition or by an appeal motion, or upon the same petition merely as that presented to the Master of the Rolls, the question of the propriety of the Order of June, 1854, that I have stated, was brought before us, when it was, with our assent, arranged between the counsel supporting and the counsel * 59 opposing * the application, that the points for argument before us should be these and these only, — [his Lordship read the questions as set out above], — and that upon the argument we should be assisted by two other Judges. Accordingly the argument, thus by consent limited, took place some time afterwards before Mr. Justice WIGHTMAN and Mr. Justice ERLE and ourselves, when *Mr. Baggallay* conducted Mr. Holloway's case in a manner most satisfactorily distinguished for diligence and ability.

The opinion of Mr. Justice WIGHTMAN and Mr. Justice ERLE upon the points thus raised and discussed has since been communicated to us. It is in these terms : [His Lordship read it ; see *ante*, p. 48.]

Having fully considered this opinion, and for that purpose reconsidered all the materials before us, I have only, after expressing our sincere acknowledgments to the two learned Judges for their valuable assistance and the attention that they have bestowed on the case, to add that, as without the great benefit of their aid I should have thought the Order of the 14th of June, 1854, right

and not to be disturbed, so their conclusion being the same, I must with greater confidence think so, and Mr. Holloway's application to us must be dismissed.

THE LORD JUSTICE TURNER. — I also agree in the opinion with which the learned Judges have favoured us in this case, and in the reasons on which that opinion is founded, and I have but little to add to those reasons. It is not, however, I think, unimportant to observe, in support of the conclusion at which the learned Judges have arrived, that in the earlier presentations to the mastership of St. Cross, which are adduced * in evidence on the * 60 part of the appellant, there is nothing whatever to indicate that the rectory of St. Faith had been united to the mastership, and that the most early mention of such an union appears to be in the presentation of Dr. Lockman in the year 1788. If this supposed union had existed at the time when these earlier presentations were made, it is scarcely possible that it should not in some manner have been noticed in them; and in further support of the opinion of the learned Judges, it may also be observed that the church of St. Faith was granted to the hospital of St. Cross in trust for the almshouse of Noble Poverty, and that no union of the rectory with the mastership of the hospital could be made, at least in the ordinary mode, without involving a breach of that trust.

It was also argued, on the part of the appellant, that if there was no sufficient ground for presuming an union of the rectory with the mastership, it ought, at all events, to be presumed that the chapel of the hospital had in some manner become a parochial chapel; but the argument founded on the breach of trust is not less strong against this view of the case than against the union of the rectory with the mastership, for this chapel must plainly have been the private chapel of the hospital whilst the fabric of the church of St. Faith was standing, and there could be no right on the part of the hospital to dedicate to the use of the public any part of their private possessions. Besides, there is a total absence of evidence of any endowment of the chapel, and it is at least difficult to suppose that a parochial chapel could exist without an endowment.

It being established that this chapel was in its origin the private chapel of the hospital, it rested upon the * appel- * 61
lant to prove that its character was changed, and that

it became either the parish church or a parochial chapel. He relied, for this purpose, upon the fact of marriages, baptisms, and burials having taken place in the chapel, and a register of them having been kept there; but these are merely circumstances on which a presumption may be founded, and which are to be weighed in connection with the other circumstances. *Moysey v. Hillcoats.* (a) In this case, the absence of any parish church, the proximity of the parish to the hospital, and the circumstance of the rectory having been granted to that establishment, tend, I think, very strongly to diminish, and the Act of Parliament to which the learned Judges have referred seems to me wholly to destroy, the weight which might otherwise have been attached to those circumstances.

For these reasons, in addition to those with which the learned Judges have favoured us, I entirely agree in their opinion, and I think this petition must be dismissed.

* 62 * In the Matter of The GRAND JUNCTION RAILWAY ACT, and

Of The LONDON AND NORTH-WESTERN RAILWAY ACT,
and

Of The LANDS CLAUSES CONSOLIDATION ACT, 1845, and

In the Matter of ELLISON'S ESTATE.

1856. February 9. Before the LORDS JUSTICES.

A special railway Act, which is repealed and in part re-enacted by a subsequent amalgamating Act, is thereby "incorporated" with the latter within the meaning of the 80th section of the Lands Clauses Consolidation Act providing for the payment of the costs in cases where moneys are deposited under the provisions of that Act or of "the special Act or any Act incorporated therewith."

Therefore, where money had been deposited under a special Act, which did not provide for the costs of obtaining payment out of Court of deposited moneys,

(a) 2 Hagg. 30.

but which was re-enacted by an amalgamating Act, with which the Lands Clauses Consolidation Act was incorporated: *Held*, that the costs of payment out of Court were within the last-mentioned Act.

THIS was an appeal from an order of Vice-Chancellor STUART, on a petition for payment out of Court of moneys paid in under the first of the above-mentioned Acts, so far as the order directed the appellants, the London and North-Western Railway Company, to pay to the petitioners their costs, according to the Lands Clauses Consolidation Act, 1845.

By the 3 & 4 Will. 4, c. 34, the Grand Junction Railway Company was incorporated, with the usual disability clauses and provisions for payment into Court of purchase-moneys, and for payment by the company of the costs of their reinvestment in land, but it contained none for the costs of the payment out of Court of those moneys.

By the 9 & 10 Vict. c. 204, the 3 & 4 Will. 4, c. 34, was with other Acts repealed for the purpose of * amalgamating * 63 the Grand Junction and other railway companies into one company called the London and North-Western Railway Company, and the principal provisions of the repealed Acts were re-enacted, and it was (section 10) enacted, that "In all cases in which, under the provisions of any of the Acts hereby repealed by such last-mentioned Acts or any other Acts, any sum of money has already been paid by any of the said dissolved companies or by any company incorporated with such companies or any of them, or shall hereafter be paid by them or any of them, or by the company hereby incorporated, into the Bank of England to any trustee or trustees on account of the purchase of any land or any interest therein, or for any compensation or satisfaction or on any other account, such sum, or the stocks, funds, or securities in or upon which the same has been or shall be invested, either by the order of the Court of Exchequer or the Court of Chancery or otherwise howsoever, and the interest, dividends, and annual produce thereof, shall be applied and disposed of pursuant to the Act or Acts under which the same has been or shall be so paid into the Bank of England, or to such trustee or trustees as aforesaid, and all the clauses, provisions, powers, and authorities contained in such Act or Acts in relation to such moneys, stocks, funds, and securities and the dividends and annual produce thereof shall for the purposes of this Act remain in full force."

By section 11 it was provided, that subject to the provisions thereinbefore contained, the Lands Clauses Consolidation Act, 1845, should be incorporated with the Act now in statement.

The Lands Clauses Consolidation Act, 1845, provides (sect. 80, omitting immaterial words), that "In all cases of moneys * 64 deposited in the bank under the provisions of * this or the special Act, except," &c. "it shall be lawful for the Court of Chancery," "to order the costs of the following matters" "to be paid by the promoters of the undertaking, that is to say" "the costs" "of the orders" "for the payment out of Court of the principal of such moneys."

Mr. Willcock and Mr. Speed, for the appellants. — This case is governed not by the Lands Clauses Consolidation Act but by the Grand Junction Railway Act, under which the money in question was paid into Court. When that payment was made the rights of all parties as to costs were at once defined, and it is unjust as well as contrary to the true meaning of the subsequent Act, to hold that it can affect those rights retrospectively. The respondent's case depends entirely on the 11th section of the Amalgamation Act, but that incorporates the provisions of the Lands Clauses Act only in a modified way and subject to the provisions of the Amalgamation Act, which re-enacts the provisions as to payment into Court of the former special Act. Nor even if the Lands Clauses Act be considered to be altogether incorporated with the Amalgamation Act will it extend to the case in which the money was not paid into Court under the Amalgamation Act nor under any Act incorporated therewith, for the only Acts incorporated therewith are the General Consolidation Acts, under none of which was this money paid into Court.

They referred to *Ex parte Molyneux*, (a) *Re Strachan's Estate*, (b) *Ex parte Langton*, (c) *Re Neachell's Trusts*, (d) *Re Doncaster's Estate*, (e) *Re Holden's Estate*. (g)

* 65 * *Mr. Renshaw and Mr. Cairns*, for the respondents. — According to *Ex parte Eton College*, (h) the first special

(a) 2 Coll. 273.

(e) *Ibid.* 635.

(b) 9 Hare, 185.

(g) *Ibid.* 644.

(c) 11 Jur. 686.

(h) 15 Jur. 45.

(d) 3 W. R. 634.

Act was one of the Acts incorporated with the Amalgamation Act, being in substance re-enacted by that Act. The money was therefore paid in under an Act incorporated with the special Act, viz., with the Amalgamation Act, and so falls within the Lands Clauses Consolidation Act, which is made part of the Amalgamation Act.

Mr. Speed, in reply. — In *Ex parte Eton College*, (a) the money had not been set apart, but was standing to the general account of the company, nor had any conveyance been executed.

THE LORD JUSTICE KNIGHT BRUCE. — The order of the Vice-Chancellor is one plainly in conformity with honesty and good sense. He declines to attribute to the legislature of this country an intention to confiscate the property of landed proprietors, and his decision is not contradicted by any order, as far as I can understand, that has at any time been made by the House of Lords, by any Lord Chancellor or by any Lords Justices. In such a state of things it would indeed require a very strong and convincing case of erroneous construction to induce me to consent to alter the order which his Honor has made. My opinion is, that the Vice-Chancellor's interpretation of the Acts has not exceeded the bounds of legitimate construction. It appears to me in accordance with the language and subject. But if I only doubted on the point it would be impossible for me to consent to discharge or vary the order which we are now reviewing; an order, as I have * said, plainly conformable to honesty and good sense. * 66 This appears to me a litigious appeal, which can only be refused with costs.

THE LORD JUSTICE TURNER. — I felt in the first instance some doubt on this case, but upon looking at the Acts of Parliament my mind has become quite satisfied about it, and I agree with the conclusion at which the Vice-Chancellor has arrived. The first question is, whether this case falls within the provisions of the original Act constituting the Grand Junction Railway Company. By the 98th section of that Act, it is enacted, "that where by reason of any disability or incapacity of any person entitled to any lands, tenements, or hereditaments to be taken or used under the authority of this Act, the purchase-money shall be required to be

paid into the Bank of England, to be applied in the purchase of other lands, tenements, and hereditaments, to be settled to the like uses, in pursuance of this Act, it shall be lawful for the said Court (if the justice of this case shall so demand) to order the expenses of all such purchases or so much of the expenses as the said Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said company out of the moneys to be received by virtue of this Act, and the said company shall from time to time pay such sums of money for such purposes as the said Court shall direct." In the present case the money has not been laid out in the purchase of other land, but those who have become absolutely entitled to the money have come to the Court for payment of the money out of Court instead of having it invested in the purchase of land. If the case depended on the 98th section of the Grand Junction Act, my opinion would have been that the costs could not be * 67 given of the application * for the payment of the money out of Court, the Act merely applying to cases where the money is laid out in the purchase of land.

Then the question is, whether the case falls within the provisions of the 10th section of the Amalgamation Act. [His Lordship read it, see *ante*, p. 63.]

The clauses, provisions, powers, and authorities here referred to I understand to mean, not the clauses, provisions, powers, and authorities which are contained in the original Act constituting the Grand Junction Company with reference to the costs, but the clauses, provisions, powers, and authorities which are contained in the original Act, with reference to the mode of investment of the money. I think so, for this reason, the costs which are to be paid under the original Act are costs to be paid out of the general funds of the company, and not out of the particular purchase-money; and when, therefore, the Amalgamation Act says that all the clauses, provisions, powers, and authorities contained in such Act or Acts in relation to such stocks, funds, and securities shall remain in full force, it means merely the clauses in relation to the application of the particular purchase-money and not of the general funds of the company, out of which the costs under the prior Act would have been to be paid.

The 11th section takes up all cases which are not covered by the 9th and 10th sections, and then it says: "Be it enacted, that sub-

ject to the provisions hereinbefore contained, the Lands Clauses Consolidation Act, 1845, shall be incorporated with this Act;" therefore the Lands Clauses Act is incorporated in all cases which are not covered by the previous sections.

Then let us see what the Lands Clauses Act says. * It * 68 says (section 80) that in all cases of moneys deposited in the bank under the provisions of this or the special Act, or any Act incorporated therewith, except the particular cases there mentioned, the particular costs which are here in question shall be paid. It is said, however, and is no doubt true, that these moneys are not deposited in the bank under the provisions of the Lands Clauses Act, nor are they, it is said, deposited in the bank under the provisions of "the special Act," i.e. the Amalgamation Act. I do not think it necessary to say whether by virtue of the Amalgamation Act they may be considered to be deposited in the bank within the provisions of that Act, the original Act being repealed by the Amalgamation Act; but the Lands Clauses Consolidation Act applies not only in all cases where moneys are deposited in the bank under the provisions of that Act or of the special Act, but in all cases where they are deposited in the bank under the provisions of any Act of Parliament incorporated with the special Act.

Then the question is, What is the meaning of the legislature when it says, "an Act of Parliament incorporated with the special Act"? I agree with the construction which Lord TAUNTON (a) has put on these words "incorporated with the special Act;" Lord TAUNTON says, that if the special Act does contain and repeat the provisions which are contained in the original Act for the purpose of effecting the purposes of the Amalgamation Act, then the original Act is to be considered as an Act incorporated with the Amalgamation Act. I think, therefore, that in the present case, looking to the decision in the Eton College case (which I am very glad to follow in a case of this description), the costs are to be paid by the company and not by the land-owner; I think it a fair construction of the Lands Consolidation Act to say, that * the * 69 original Act is within the fair construction of the 80th section, an Act incorporated with the special Act, and that these costs are therefore payable by the company.

(a) *Ex parte Eton College*, 15 Jur. 45.

It does not seem to me, with deference to Sir RICHARD KINDERSLEY, that it can make any difference whether the contract has been completed or not.

I think, therefore, that this appeal must be dismissed, and dismissed with costs.

SNOW v. BOOTH.

1856. February 15. Before the LORDS JUSTICES.

A reversioner in fee expectant on the death of the survivor of two tenants for life granted an annuity for ninety-nine years determinable with lives, and with a surety covenanted for payment of the annuity. He also demised the reversion for 500 years in trust, if the annuity should be in arrear, to sell the reversion and raise the arrears and future payments of the annuity. The grantor and surety became bankrupts, and when the annuity had been in arrear more than twenty years, the annuitant filed a bill to have the arrears raised: *Held*, that the Statute of Limitations did not apply.¹

THIS was the appeal of the defendant from a decree of Vice-Chancellor Wood, directing the payment to the plaintiff of an annuity with arrears, beyond the period of six years.

The case is reported in the 2d volume of Messrs. Kay & Johnson's Reports. (a)

The annuity was secured by an indenture, dated the 8th of April, 1824, and made between Edward Hampton Noy of the first part, Matthew Hercules Sheppard (a surety) of the second part, George Morris of the third part, and Edward Bridger of the fourth part, whereby Noy and Sheppard covenanted to pay Morris, his
* 70 executors, * administrators, or assigns, an annuity of 36*l.* for a term of ninety-nine years, if William Lee, Thomas Lee, Alfred Bridger, and Charles Bridger, if any or either of them, should so long live. By the same deed Noy demised to Edward

(a) Page 132.

¹ See Sugden V. & P. (14th Eng. ed.) 478 and cases in n. (d); Perry Trusts, § 863 and cases cited; Lewin Trusts (5th Eng. ed.), 637; Lewis v. Duncomb, 29 Beav. 175; Lawton v. Ford, L. R. 2 Eq. 97; Earl of Mansfield v. Ogle, 1 Jur. N. S. 414; *Re Wyse*, 4 Ir. Ch. 297; Cox v. Dolman, 2 De G., M. & G. 592, and cases cited in notes; Hunter v. Nockolds, 1 Mac. & G. 640, and cases in n. (2).

Bridger, his executors, administrators, and assigns, for 500 years, certain hereditaments to which Noy was entitled in reversion in fee under the will of a Mr. Hampton, subject to the life-estates of the testator's daughters, upon trust to permit Noy and his heirs to hold the premises until they should become liable to be sold under the trusts thereafter declared, and upon further trust in case the annuity should be in arrear by the space of one calendar month next after any of the days or times whereon the same ought to be paid as aforesaid, then that the said Edward Bridger, his executors, administrators, or assigns, should, without the necessity of any further consent or concurrence of Noy, his heirs or assigns, and either before or after the decease of the testator's two daughters or the survivor of them, make sale and absolutely dispose of the premises or such part or parts thereof as the said Edward Bridger should think proper for all the then residue of the term of 500 years thereby granted: and it was declared that Edward Bridger, his executors, administrators, and assigns, should stand possessed of the moneys to arise by the sale or sales to be made under the trusts thereby declared, and of and in the rents and profits (if any) of the said hereditaments and premises becoming payable after the same should become liable to be sold, and until the same should be received by the said Edward Bridger, his executors, administrators, or assigns, upon trust, after payment of costs, to pay to Morris, his executors, administrators, and assigns, such of the premiums and expenses of assurance and interest thereon thereafter covenanted to be paid as should then remain owing to him or them, and in the next place to pay to Morris, * his executors, * 71 administrators, or assigns, so much of the annuity thereby granted as at the time of such sale or sales should be in arrear, with all costs, damages, and expenses occasioned by default in payment of the annuity, and upon trust to invest the then residue of the purchase-moneys, rents, issues, and profits in the public funds, and out of the dividends, and if such dividends should be insufficient, then in addition thereto by disposing of from time to time sufficient part or parts of the principal money to pay the arrears from time to time of the annuity and the premiums on the insurance therein mentioned, with interest and costs, with an ultimate trust in favour of Noy.

Sheppard became bankrupt in 1827, and Noy in 1829.

Noy's interest under the ultimate trust in the annuity deed was

sold by his assignees, and had become vested in Mr. Drysdale, one of the defendants, upon certain trusts for sale.

One of the tenants for life under the will was still living.

No payment of the annuity had been made since 1831, and the plaintiff, who was the executor of Morris, instituted the present suit in 1855 against Drysdale and formal parties, praying that the hereditaments comprised in the 500 years' term might be sold, and the proceeds applied in payment of the arrears of the annuity, and that the residue might be invested to secure the future payment of the annuity.

The defendant Drysdale, by his answer, claimed the benefit of the Statute of Limitations.

* 72 * By the decree under appeal, an account was directed generally of what was due in respect of the annuity, and the hereditaments comprised in the term were ordered to be sold.

The defendant Drysdale appealed from the whole decree.

Mr. Rolt and Mr. Boyle, for the plaintiff. — They referred to *Phillipo v. Munnings*, (a) *Ravenscroft v. Frisby*, (b) *Ward v. Arch*, (c) *Young v. Lord Waterpark*, (d) *Francis v. Grover*, (e) *Roch v. Callen*, (g) *Hunter v. Nockolds*, (h) *Cox v. Dolman*. (i)

Mr. Daniel and Mr. T. Stevens, for the appellant. — They contended that *Hunter v. Nockolds* (h) was exactly in point, and that the exception in the 3 & 4 Will. 4, c. 27, as to express trusts, was not intended to apply to a mere security for money.

THE LORD JUSTICE KNIGHT BRUCE. — I assume that not any action or suit addressed immediately to the recovery of the money, on the ground of personal liability, could be maintained, either at all or to recover the arrears of the annuity for more than six years. That, however, does not in any manner affect the question as to the extent to which the property made a security for the debt is chargeable with it. In this case an estate in reversion is charged with the debt (for the term created by the deed of

* 73 1824, is * not yet in possession), and the Court is asked to

(a) 2 Myl. & Cr. 309.

(b) 1 Coll. 16.

(c) 12 Sim. 472.

(d) 13 Sim. 204.

(e) 5 Hare, 39.

(g) 6 Hare, 531.

(h) 1 Mac. & Gor. 640.

(i) 2 De G., M. & G. 592.

give effect to the trust for sale contained in the security for the purpose of paying the annuity and the arrears. It is agreed that the mode of enforcing the security by means of the term, would be by ejectment after the termination of the remaining life-estate. It is quite clear that the trustee could then hold the term upon the trusts declared by the deed of 1824, for raising the arrears. It is equally clear that there is a present trust for the sale of the term for the same purpose. But then it is contended that no arrears for a period greater than six years can be recovered, because the Statute of Limitations might have been successfully pleaded in answer to an action or suit for enforcing a personal liability. With that argument I cannot agree. I think that within the letter of the Act, the whole of the arrears are within the meaning of the exemption. *Cox v. Dolman*, (a) and not that case alone, would be sufficient authority, if any were necessary for so holding. But no authority is necessary. I think the decision of the Vice-Chancellor right, and that the appeal must be dismissed with costs.

The Lord Justice TURNER concurred.

* PALMER v. NEWELL.

* 74

1856. February 16. Before the LORDS JUSTICES.

A donor standing *in loco parentis* to several children executed a voluntary deed charging real estate with annuities in favour of the children and their mothers, the annuities to females being given to their separate use, and with a power of revocation. Fifteen years afterwards he executed another voluntary deed, not revoking or referring to the former, and giving annuities of smaller amounts, not secured on land, to some of the former annuitants, but not as regarded females, to their separate use: *Held*, that the annuities were cumulative.

THIS was an appeal from the decision of the Master of the Rolls, reported in the 20th volume of Mr. Beavan's Reports, (b) holding annuities given by two voluntary deeds to be cumulative.

(a) 2 De G., M. & G. 592.

(b) Page 32.

By one of the deeds, dated the 10th of August, 1838, Sir John Chichester demised a freehold estate to trustees, in trust to secure after his death an annuity of 100*l.* for Sarah Lavallin, an annuity of 100*l.* for her son Robert Bruce, an annuity of 52*l.* for Sarah Benham, an annuity of 52*l.* for her daughter Sarah Palmer Benham, an annuity of 20*l.* for Elizabeth Hellyer, an annuity of 40*l.* for Eliza Hellyer (the daughter of Elizabeth and William Hellyer), an annuity of 40*l.* for Elizabeth (the eldest daughter of the said Elizabeth Hellyer); all the annuities were for the lives of the annuitants, and those to females were to be paid to their separate use. And the deed reserved a power of revocation to the settlor, to be exercised by any deed attested by two or more credible witnesses or by his last will.

The other deed was dated the 27th of June, 1851, and made between Sir John Chichester of the one part, and different trustees of the other part. It recited that Sir John was desirous of securing the payment after his decease of the several annuities thereafter mentioned. By the witnessing part he covenanted with the trustees that in case Sarah Lavallin should survive him, and
 * 75 her * son Robert Bruce should be living and under the age of twenty-one years at Sir John's death, Sir John's executors or administrators would pay to Sarah Lavallin an annuity of 150*l.* until Robert Bruce should attain twenty-one years or die under that age (such annuity to continue whether Sarah Lavallin should remain single or marry); and further, that immediately after Robert Bruce should attain twenty-one, or die under that age (in case he should be living and under the age of twenty-one years at the decease of Sir John, and Sarah Lavallin should be then living and a spinster), or from and immediately after the decease of Sir John (in case Robert Bruce should have attained the age of twenty-one years or died under that age in the life-time of Sir John, and Sarah Lavallin should be living and a spinster at the decease of Sir John), Sir John's heirs, executors, or administrators would pay Sarah Lavallin an annuity of 100*l.* during her life until she should marry; and further, that in case Sarah Lavallin should survive Sir John, and should marry, then his heirs, executors, or administrators would, from her marriage, or from the decease of Sir John, or from the time when Robert Bruce should attain twenty-one years or die under that age, pay her an annuity of 50*l.* for life; and in case Robert Bruce should survive Sir John,

and should attain twenty-one, Sir John's heirs, executors, or administrators would pay Robert Bruce, from the decease of Sir John or from Robert Bruce's attaining twenty-one, and during the life of Robert Bruce, such annuity as was thereafter mentioned (that was to say), in case Sarah Lavallin should have died or married before the covenant now in statement should come into operation, an annuity of 100*l.* during the life of Robert Bruce; and in case Sarah Lavallin should be living, and a spinster when the covenant should come into operation, an annuity of 50*l.* during the joint lives of Robert Bruce and Sarah * Lavallin * 76 or until she should marry in the lifetime of Robert Bruce; and after the decease or marriage of Sarah Lavallin in the lifetime of Robert Bruce, an annuity of 100*l.* during the life of Robert Bruce. And further, that in case Eliza Hellyer should be living at Sir John's death, his heirs, executors, or administrators would pay her an annuity of 20*l.* for life; and in case Sarah Palmer Benham should be living at his decease, his heirs, executors, or administrators would pay her an annuity of 20*l.* for life. And further, that in case Elizabeth Damer (formerly Handcock) should be living at Sir John's death, his heirs, executors, or administrators would pay her an annuity of 15*l.* for life. This deed contained a proviso, that in case any of them, Sarah Lavallin, Robert Bruce, Eliza Hellyer, Sarah Palmer, and Elizabeth Damer, should at any time remain more than twenty-four hours during any twelve months at the then present mansion-house of Sir John, then, and in such case, and immediately thereupon, their annuities should cease.

It appeared that some of the annuitants were Sir John's natural children and their mothers, and that he had stood *in loco parentis* to the children.

The suit was instituted by Sarah Palmer Benham and Eliza Hellyer to enforce payment of the annuities.

Mr. Bagshawe, and *Mr. Bagshawe, Jr.*, for the plaintiffs, and *Mr. Piggott*, *Mr. Speed*, and *Mr. Rodwell*, for other annuitants, supported the decree.

Mr. Roundell Palmer and *Mr. Amphlett*, in support of the appeal.—The evidence shows that the grantor had forgotten the first deed when he executed the second. Trifling differ-

* 77 ences * in provisions are not enough to exclude the presumption against double portions. Nor is the presumption confined to cases where one of the provisions is by will. It applies generally, and to provisions by way of annuity as well as others.

They referred to *Thynne v. Earl of Glengall*, (a) *Pym v. Lockyer*, (b) *Weall v. Rice*, (c) *Powys v. Mansfield*, (d) *Thomas v. Kemeys*, (e) *Savage v. Carroll*, (g) *Lingen v. Sowray*, (h) *Earl of Durham v. Wharton*, (i) *Trimmer v. Hayne*, (k) *Lloyd v. Harvey*. (l)

THE LORD JUSTICE TURNER. — In this case Sir John Chichester, by a deed executed in 1838, granted life annuities to seven persons, one to Sarah Lavallin for life, and then to her son Robert Bruce, and the others to several other parties. On the 7th of June, 1851, he executed another deed, granting annuities of different amounts to five of the annuitants under the former deed, and the question is, whether both sets of annuities are payable.

It was contended on behalf of the appellant, that Sir John Chichester, when he executed the second deed, had forgotten the execution of the former deed, and that the presumption against double portions applies to such a case as the present. But, whatever may be the impression of the Court, as to the probability of

Sir John Chichester having forgotten the first deed, the * 78 * Court cannot on the materials before it judicially attribute to him such forgetfulness.

Supposing him, then, not to have forgotten the execution of the first deed, this important consideration arises: the first deed contains a power of revocation; and, if the Court is bound to assume Sir John Chichester to have the first deed in his recollection, the fact, that he did not by the second deed purport to exercise the power of revocation, affords a strong presumption against the intention to make the provisions made by the second deed substitutional for those made by the former. There is no doubt that

(a) 2 H. L. Cas. 131.

(b) 5 Myl. & Cr. 29.

(c) 2 Russ. & Myl. 251.

(d) 3 Myl. & Cr. 359.

(e) 2 Vern. 348.

(g) 1 Ball & Beat. 265.

(h) 1 P. Wms. 172.

(i) 3 Cl. & Fin. 146.

(k) 7 Ves. 508.

(l) 2 Russ. & Myl. 310.

the general presumption is against double portions in giving effect to provisions made either by parents or by persons standing *in loco parentis*. But in every case the Court looks to the nature of the provisions and the language of the instruments to see whether a double provision was intended or not. Now here some of the annuitants were persons to whom the grantor did not stand *in loco parentis*, and to whom, therefore, the rule against double portions could not apply. Nor am I aware of any case in which the rule has been applied where the first deed was subject to a power of revocation which had not been exercised, nor to a case where the provisions were annuities of different amounts.

Here there are many important differences between the provisions. Those of the first deed are for the greater part for the benefit of married women, and are limited to their separate use; but the provisions of the second deed are not so limited. The annuities given by the first deed are given absolutely, subject only to a power of revocation; those given by the second deed are subject to a restriction, of which there is no trace in the former deed, that if any of the annuitants should remain for more than twenty-four hours at the mansion-house of Sir John

* Chichester, at Arlington, during any twelve months, the * 79 annuities of such person or persons should absolutely cease.

The annuities are very different in amount, and those given by the second deed are less than those given by the former deed. Moreover, the annuities given by the first deed are secured on real estate, whereas those given by the second deed rest on covenant only.

This case is distinguished in its circumstances from any of those referred to, and in my opinion the intention was not that the annuities in the second deed should be substitutional for those given by the former deed. I agree, therefore, with the decision of the Master of the Rolls, that full effect should be given to both deeds.

The Lord Justice KNIGHT BRUCE concurred.

Appeal dismissed.

SHILLIBEER v. JARVIS.

1856. February 11, 12, 18. Before the LORDS JUSTICES.

After an offer had been made by the plaintiff to take a lease of a farm from the defendants, a draft was prepared by the defendants' solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendants' solicitors, and executed some repairs: *Held*, that, although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part-performance to take the case out of the Statute of Frauds, and a specific performance was decreed.¹

THIS was an appeal from a decree of Vice-Chancellor STUART, directing specific performance of an agreement entered into by some of the defendants to grant a lease to the plaintiff.

* 80 * In 1853 one William Lamb was tenant to Sir Samuel Raymond Jarvis and John Macpherson, two of the defendants, and Maria Barnard, widow, since deceased, of a farm called Miller's Farm, situate at Chigwell in Essex.

The farm was partly of freehold and partly of copyhold tenure. Of the freehold part one undivided third part stood limited to the usual uses to bar dower in favour of the defendant Sir Samuel Raymond Jarvis and his heirs, and another undivided third part to the usual uses to bar dower in favour of the defendant John Macpherson and his heirs, and the remaining third part was devised by the will of George Barnard, the late husband of Maria Barnard, under a general devise of real estate to Charles Hopkinson, since deceased, and William Paxton Jarvis, one of the defendants, upon trust to pay the rents thereof to Maria Barnard during her life, and after her decease, in trust for the children of George Barnard as therein mentioned. By the will the trustees were empowered to let any part of the testator's real estate for a term not exceeding twenty-one years in possession, at the best rent,

¹ See *Sugden V. & P.* (14th Eng. ed.) 151 (7th Am. ed.), 162.

and subject to such covenants as they should think reasonable and proper.

The copyhold part of the farm was vested in Murthwaite Nicholson, one of the defendants, in trust, as to one undivided third part thereof, for Sir Samuel Raymond Jarvis for life, with remainder to a trustee during the life of and in trust for Sir Samuel Raymond Jarvis, with remainder for Sir Samuel Raymond Jarvis in fee-simple; and as to another undivided third part thereof, in trust for John Macpherson for life, with remainder to a trustee during the life of and in trust for John Macpherson, with remainder for John Macpherson in fee; and as to the remaining undivided third part thereof, in trust for Maria Barnard for her life, with remainder for the trustees of * the will of * 81 George Barnard, upon the same trusts as were by the will declared as to his freehold estate.

The tenant Lamb, being in arrear of his rent, Messrs. Amory, Travers, & Smith, solicitors, as the agents and on behalf of Sir Samuel Raymond Jarvis, John Macpherson, and Maria Barnard, caused a distress to be made on the farm, under which the tenant's goods and stock were, on the 15th of November, 1853, sold.

The plaintiff attended the sale, and supposing that Lamb would under the circumstances quit the farm, authorized the auctioneer to offer on the plaintiff's part to take a lease for twenty-one years, determinable at the end of seven or fourteen years, at a rent of 90*l.* a year, the plaintiff paying all tithes, rates, and taxes and offering to do the necessary repairs if he were allowed a quarter's rent towards them.

In consequence of the plaintiff's offer, a meeting took place by appointment on the 17th of November, 1853, at the office of Messrs. Amory & Co., but Sir Samuel Raymond Jarvis requiring a higher rent than 90*l.*, and the plaintiff declining to give more, no agreement was then come to.

On the 18th of November, 1853, the plaintiff offered the auctioneer a rent of 100*l.* a year, on being allowed a quarter's rent for repairs, such rent to commence from the 25th of the same month of November.

On the 21st of November, 1853, Sir Samuel Raymond Jarvis called by appointment at the office of Messrs. Amory & Co., and stated that he would accept the plaintiff as a tenant of the farm at

the rent of 100*l.* a year, for the term of twenty-one years,
 * 82 determinable at the * end of eight, twelve, or sixteen years,
 and would allow him a quarter's rent for the repairs, provided he could arrange with Lamb as to his claims for manure and dressings, &c., on the farm.

On the 23d of November, 1853, Mr. Stokes, a clerk of Messrs. Amory & Co., called on the plaintiff and informed him that Sir Samuel had agreed to accept the plaintiff as tenant of the farm upon the terms just mentioned. The plaintiff accordingly arranged with Lamb, who agreed to take 40*l.* in respect of his claims, on condition of being released from the agreement under which he held the farm.

On the 25th of November, 1853, the plaintiff, Lamb, the auctioneer, and Stokes met at the office of Messrs. Amory & Co., when Stokes cancelled the agreement under which Lamb had held the farm by cutting off Lamb's signature; and one of the partners of the firm of Amory & Co. wrote across the foot of the agreement the following words: "This agreement cancelled this 25th November, 1853, on Mr. Lamb giving possession to Mr. George Shillibeer. AMORY, TRAVERS, & SMITH, agents for Sir Samuel Raymond Jarvis and others." At the same meeting Stokes produced and submitted to the plaintiff a draft agreement which had been prepared in the office of Messrs. Amory & Co., for a lease of the farm to the plaintiff from Sir Samuel Raymond Jarvis, John Macpherson, and Maria Barnard. By this draft the proposed lessors agreed to let the farm to the plaintiff, and he agreed to accept a lease thereof for twenty-one years, from the 25th of November, 1853, determinable at the end of eight, twelve, and sixteen years, at the rent of 100*l.* a year, the plaintiff paying the tithes, rates, and taxes, and being allowed 25*l.* towards the repairs. In other respects

* 83 the terms of the agreement were similar * to those contained in the agreement under which Lamb had held.

The plaintiff at the meeting of the 25th of November perused the draft so submitted to him, and after Stokes had at the request of the plaintiff inserted some words qualifying a restriction in the draft as to underletting and made some other trifling alterations, the plaintiff approved of the draft, which was on the same day sent by Messrs. Amory & Co. to Sir S. R. Jarvis. On the 26th of November, 1853, the plaintiff and the auctioneer went to the farm

and the plaintiff paid 40*l.* to Lamb for the manure, dressings, &c., whereupon Lamb handed the key of the farm-house to the auctioneer, who delivered it to the plaintiff and gave him possession of the farm. The auctioneer took an inventory of the landlord's fixtures to be inserted in the lease. On the 28th of November, Sir S. R. Jarvis saw Mr. Smith, one of the partners in the firm of Amory & Co., and having suggested some alterations in the draft, left it with Mr. Smith to ascertain whether the plaintiff would agree to the alterations. The draft was accordingly left with the plaintiff, and on the 6th of December, 1853, Mr. Stokes again called on the plaintiff for the draft, when the plaintiff told him to make the best arrangement he could, adding at the same time that Sir Samuel might put the alterations proposed by him into the lease or not, as he pleased, and might in fact have entirely his own way. Mr. Stokes took the draft agreement away with him and the plaintiff proceeded to do the repairs and to drain, manure, and improve the farm. On the 12th of December, 1853, Messrs. Amory & Co. informed Sir Samuel by letter that the plaintiff had been let into possession of the farm on the 26th of November, but Sir Samuel subsequently disputed the authority of his solicitors and the auctioneer to make the arrangement with Lamb, or to * give possession to the plaintiff, and having changed his * 84 solicitors he commenced proceedings in ejectment against the plaintiff, whereupon the plaintiff instituted the present suit, seeking specific performance of the agreement and an injunction against the proceedings at law. By his bill he stated that he had, on the faith of the agreement, laid out at least 1000*l.* in repairing, draining, and improving the farm, and purchasing stock and implements for it.

The other facts of the case and the arguments appear sufficiently from the judgment of the Lord Justice TURNER.

Mr. Malins and *Mr. H. Stephens*, for the plaintiff.

Mr. Craig and *Mr. G. S. Law*, for the defendants.

The following cases were referred to: *Deverell v. Lord Bol-*
VOL. VIII. 5 [65]

ton, (a) *Lucas v. James*, (b) *Holland v. Eyre*, (c) *Ridgway v. Wharton*, (d) *Dann v. Spurrier*, (e) *Gregory v. Wilson*. (g)

THE LORD JUSTICE TURNER. — This is an appeal from a decree of Vice-Chancellor STUART directing the specific performance of an agreement for a lease. There is some peculiarity in the case arising from the position of the defendants, and the acts done by them. The freehold belongs in thirds to Sir Samuel Raymond

Jarvis, Mr. Macpherson, and the trustees under the will of * 85 Mr. Barnard. Mr. Macpherson * submitted to be bound by the acts of Sir Samuel Raymond Jarvis, but the trustees are no parties to the agreement. The decree therefore is against Sir Samuel Raymond Jarvis and Mr. Macpherson only. But as all had concurred in the proceedings in ejectment, the trustees were necessary parties to the suit, and are liable to the costs of it.

It is admitted that there was no written agreement signed by the plaintiff, and on behalf of the appellants three points were urged. First. That there was no agreement even by parol. Secondly. That if there was any such agreement there had been no sufficient part performance to exclude the operation of the Statute of Frauds. Thirdly. That if there was a sufficient verbal agreement and part performance, there has been a breach of the agreement under which a lease, if granted, could have been avoided.

On the first objection, as to there being no parol agreement, it is unnecessary to enter into the details of the case before the 25th of November, 1853; it is sufficient to refer to the facts that the farm had been in the occupation of Lamb under an agreement for a lease for seven and a half years from Lady-day, 1850, that distresses had been levied for rent, and that sales had taken place under them; that the plaintiff had proposed to become tenant of the farm, and that negotiations had taken place with the plaintiff, through Sir Samuel Raymond Jarvis's solicitors, for the plaintiff's becoming tenant of the farm.

On the 25th of November, 1850, the plaintiff and Lamb went

(a) 18 Ves. 505.

(c) 2 Sim. & St. 194.

(b) 7 Hare, 410.

(d) 3 De G., M. & G. 677: [6 H. L. Cas. 238.]

(e) 7 Ves. 231.

(g) 9 Hare, 683.

to the office of Messrs. Amory & Co., and Lamb's agreement was cancelled. A draft of an agreement with the plaintiff was produced by Messrs. Amory & Co.'s clerk, and approved * 86 by the plaintiff. Directions were afterwards given by Messrs. Amory & Co. to let the plaintiff into possession. On the 26th of November the plaintiff settled with Lamb and paid him 40l. He was then let into possession.

But all this is alleged to have taken place without any authority from Sir Samuel Raymond Jarvis. I will assume it to have been so. It appears, however, that the draft agreement was sent on the 25th of November to Sir Samuel Raymond Jarvis, and that he objected to some of the provisions of it, and wrote suggestions on the draft. He came to town on the 28th of November, and discussed the objections with Mr. Smith, a partner of the firm of Amory & Co., and left the draft with them, for the purpose (as appears by the subsequent correspondence and proceedings) of its being ascertained whether the plaintiff would agree to the alterations.

The agreement was then, either on the 28th of November and in the presence of the defendant Jarvis, or immediately afterwards (it is not material to decide which) altered to carry out the defendant's suggestions. It was left with the plaintiff on the 29th of November, and he took time to consider the alterations. On the 6th of December, the plaintiff had an interview with Stokes, and at this interview, I have no hesitation in saying, that we are bound upon the evidence before us to conclude that the plaintiff agreed to the suggested alterations which had been made in the draft.

The agreement, with the suggested alterations, having been left with Amory & Co. for the purpose of their obtaining the plaintiff's agreement to the suggestions and alterations, it cannot, I think, be disputed that Amory & Co. had full authority to offer the farm to the * plaintiff upon the term of the agreement as * 87 modified by the suggestions and alterations, and to those terms the plaintiff agreed. Here was therefore a complete parol agreement. But then it is said that the agreement was not signed and that there has been no sufficient part performance. I, however, am of opinion that there has been sufficient part performance, for there has been expenditure in repairs. These repairs can be referred only to the agreement, the plaintiff having had

nothing to do with the farm except under agreement. The case in this respect would not be altered by the plaintiff's possession being, as I have assumed it to have been, unauthorized. If possession had been delivered by the authority of the defendants, there would have been two acts of part performance. But the possession, being assumed to be unauthorized, may not have had that operation, still that circumstance cannot operate to destroy the effect of the second act, the repairs. It was, moreover, a part of the agreement that the lease should not be granted till the repairs were done. Lamb may well be considered to have allowed the plaintiff to do the repairs. But surely, Lamb having so allowed the plaintiff to do the repairs could not alter the effect of the act as between the plaintiff and the defendant Sir Samuel Raymond Jarvis.

There remains then only the point as to a breach of the agreement. But I am of opinion that the defendants have made no case upon this point. The decree, therefore, appears to me right in substance.

The Lord Justice KNIGHT BRUCE concurred; and some alterations in the details of the decree having been agreed to by the plaintiff, the appeal was dismissed with costs.

1856. February 16, 18. Before the LORDS JUSTICES.

Where a clergyman employed persons to act for him as brokers in dealings of a stock-jobbing kind, and in a suit for an account sought a discovery of the dealings between them: *Held*, that they could not protect themselves by alleging that the discovery would subject them to the penalties imposed by 57 Geo. 3, c. 40, on persons acting as brokers in the city of London without a license, it not being stated that the plaintiff was aware of the defendants' not being qualified.² Whether it would have made any difference if he had been aware of this, *quære*.

¹ S. C., 2 Jur. N. S. 294; 25 L. J. Ch. 441.

² See 1 Dan. Ch. Fr. (4th Am. ed.) 566.

THIS was an appeal of the defendants from the decision of the Master of the Rolls, reported in the 21st volume of Mr. Beavan's Reports, (a) allowing exceptions to the answer of the defendants, who objected to make discovery respecting dealings by them as brokers, on the ground that it would tend to subject them to penalties.

The bill stated that the defendants Kitchen and Gregson, carrying on business in copartnership as stock and share brokers, were employed by the plaintiff from June, 1850, down to December, 1852, as his brokers in buying and selling shares and bonds in British, colonial, and foreign railways and mining companies, and in buying and selling the stocks of foreign countries, and the prayer was for an account.

The defendants severally declined to answer the interrogatories as to the dealings and transactions between them and the plaintiff, on the ground that the discovery of all or any of the matters declined to be answered would tend to subject them respectively to the penalties imposed by the 57 Geo. 3, c. 40, which enacts (sect. 1), that all persons admitted to act as brokers within the city of London and liberties thereof, by the Court of Mayor and Aldermen, in pursuance of Stat. 6 Anne, c. 16, shall upon their admission, over and above the sum of 40s. by the last-mentioned Act required to be paid, * pay to the chamberlain of the said * 89 city the sum of 3l., and shall also yearly pay the chamberlain, over and above the yearly sum of 40s. required by the same Act to be paid, the sum of 3l. The Act also provides (sect. 2), that if any person shall take upon him to act as a broker or employ any person under him to act as such (not being admitted in pursuance of the said recited Act), every such person so offending shall forfeit and pay to the use of the mayor and commonalty and citizens for every such offence the sum of 100l.

Mr. Follett and Mr. Martindale, for the appellants. — They referred to *Short v. Mercier*, (b) *Robinson v. Lamond*, (c) *Fisher v. Ronalds*, (d) *Parkhurst v. Lowten*, (e) *Maccallum v. Turton*, (g) *Green v. Weaver*, (h) *The East India Company v. Atkins*, (i)

(a) Page 365.

(b) 2 De G. & Sm. 635; 3 Mac. & Gor. 205.

(c) 15 Jur. 240.

(g) 2 Y. & J. 183.

(d) 12 C. B. 762.

(h) 1 Sim. 404.

(e) 2 Swanst. 194.

(i) 1 Strange, 168.

Weaver v. Earl of Meath, (a) *Paxton v. Douglas*, (b) *The King of the Two Sicilies v. Willcox*, (c) *Johnson v. Hudson*, (d) *Smith v. Mawhood*. (e)

Mr. Roundell Palmer and *Mr. W. Rudall*, for the plaintiff. — They referred to *Johnson v. Hudson*, (d) *Brown v. Duncan*, (g) *Ex parte Dyster*, (h) *Hewitt v. Price*, (i) *Maccallum v. Turton*, (k) *Short v. Mercier*. (l)

Mr. Follett, in reply.

* 90 * THE LORD JUSTICE KNIGHT BRUCE. — The suit before us is instituted by a plaintiff describing himself as a clergyman, for the purpose of obtaining an account and relief in respect of certain transactions of a stock-jobbing kind, in which the plaintiff says he employed the defendants, who are, I believe, stock-brokers or stock-jobbers, or both, and by which the plaintiff seems, to his regret, not to have been a gainer. Though I have used the expression “of a stock-jobbing kind,” yet it seems that they related to such funds and shares as do not fall within the Statute 7 Geo. 2, c. 8, for this case has been argued without any reference to that Act of Parliament, — the statute which produced the decision (I think the correct decision) in *Short v. Mercier* — and with offences against which, therefore, not any thing that I am about to say is to be understood as having any connection.

The substantial question upon the present appeal is, whether, when a person has acted in the city of London as a broker for another, and if as his broker of course as his agent, and accordingly is liable to be and is sued in equity by the employer for an account in respect of the transactions of the agent on the principal's behalf, and is in the suit required to discover their particulars, the defendant ought to be protected or relieved from the ordinary necessity or obligation of giving that discovery, on the ground that he was not duly authorized to act as a broker, and, having

(a) 2 Ves. Sen. 108.

(b) 19 Ves. 225.

(c) 1 Sim. N. S. 301.

(d) 11 East, 180.

(e) 14 M. & W. 452.

(f) 2 De G. & Sm. 635; 3 Mac. & G. 205.

(g) 10 B. & C. 93.

(h) 1 Mer. 155.

(i) 4 Man. & Gr. 355.

(k) 2 Y. & J. 183.

done so, has therefore become liable to be compelled to pay pecuniary penalties to the corporation of London. The point thus brought forward is substantially or exactly the same as that unsuccessfully raised in *Green v. Weaver*, (a) by two of the * defendants in that case, from the determination in which * 91 we should, I apprehend, be substantially departing were we not to abide by the conclusion at which the Master of the Rolls has in the present case arrived. *Green v. Weaver*, (a) thus followed by his Honor, was decided by Sir A. HART after much consideration, as long ago as the year 1827, and we ought not without clear conviction to dissent at once from both. But the leaning of my opinion is towards that of the two learned Judges.

Nor can the particular nature of the plaintiff's pursuits entitle the defendants to favour. It is not (as I understand) alleged that the plaintiff at any time during the course of the dealings in controversy was aware or had notice that the defendants were not sworn brokers,—had not been duly admitted or were not well justified in acting as brokers within the city of London. Nor am I sure that the allegation, if made, would have been material: on that point, however, I give no opinion. We must, I think, consider these defendants to have represented themselves to the plaintiff as authorized to act for him lawfully in the capacity of brokers in the city of London, and the plaintiff throughout to have believed them both liable in respect of his dealings with them to all the remedies to which, by the general law of this country in ordinary cases, a principal is entitled against his agent, and I do not in such circumstances feel it incumbent on me to join in an order reversing or varying the judgment before us, even though the plaintiff (who in the face of society avows his participation in the matters which his bill states) is a clergyman. He does not, I agree, hold himself out as beneficed.

It has been argued that the bill states a case or cases of * misdemeanor: upon that point I give no opinion. If it * 92 does, I conceive that in the circumstances of the present case this makes no difference.

Wishing that I could refuse to the plaintiff the costs of the appeal, I fear that I cannot.

THE LORD JUSTICE TURNER. — It is unnecessary for me to say how far the rules relating to protection against discovery may go. It is enough to say, that I agree with the principles on which I understand the decision in *Green v. Weaver* to have proceeded. The relative positions of the parties are the same here as in that case. I think that the defendants are precluded from taking the objection which they have set up. The decision of his Honor the Master of the Rolls appears to me quite right.

Appeal dismissed with costs.

* 93 *FERRAND v. THE MAYOR, ALDERMEN, AND
BURGESSES OF BRADFORD.

1856. February 19. Before the LORDS JUSTICES.

Any Judge of the Court may dispense with the general orders of the Court where justice requires it, and this jurisdiction is not impliedly excluded by the 46th Order of August, 1852, from cases not within it.

Therefore, where from the illness of the plaintiff's solicitor, a printed copy of a written injunction bill had not been filed within the time limited by the 3d Order of August, 1852: *Held*, that the Master of the Rolls had properly ordered the bill to be restored to the file and the printed copy to be received, and that, notwithstanding the 3d Order, the plaintiff or his solicitor should not pay the defendant's costs occasioned by the omission to file a printed bill.¹

THIS was an appeal from an order of the Master of the Rolls, directing the restoration to the file of a bill which had been removed from the file under the 3d order of August, 1852; a printed copy of the bill not having been filed within the time limited by that order.

The written bill, which sought an injunction, was filed on January 19, 1856, with an undertaking to file a printed bill within fourteen days, which expired on the 2d of February. On the 5th of February, a clerk of the plaintiff's solicitor tendered the printed copy, and was informed that it could not be received;

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 397..

the bill having been taken off the file under the order in question, which provides, that "the clerks of records and writs shall, at the expiration of fourteen days from the filing of any written bill or any written copy of a bill, take off the files of the Court without further order the bill or copy so filed unless a printed copy thereof shall in the mean time have been filed, and the plaintiff in the suit or his • solicitor, who shall personally have undertaken to file such printed copy, shall pay to the defendant all the costs incurred by him in the suit, such costs to be taxed by the taxing master without further order, upon production to him of the certificate of the clerk of records and writs that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid by a party in a suit to another party in a suit are now recoverable."

On the same day the plaintiff gave notice of motion * that * 94 the bill might be restored to the file and the printed copy received, and in support of the motion the managing clerk of the plaintiff's solicitor deposed, that he had the conduct of the cause, and that the omission occurred in consequence of the following circumstances: that one of the partners in the firm who attended to another department of the business had been ill, and that one of the managing clerks of the chancery department had been obliged to take his place, that this had rendered it impossible for the managing clerks of the chancery department to look so minutely as usual into the details of the business, and consequently the deponent, whose duty it was to see that his order to file the printed copy had been attended to, had omitted to do so; that the head clerk of the chancery department, whose duty it also was to see that the print had been filed, had also been ill and unable to attend to business; that owing to these circumstances the omission was not discovered till the evening of Monday the 4th of February, when the clerk who had been directed to file the print remembered that he had not done so.

By the order under appeal it was ordered, that notwithstanding the time limited by the General Orders of this Court of the 7th day of August, 1852, had expired, the written bill filed on the 19th day of January, 1856, which had been taken off the file pursuant to the said order, should be restored to the file, and that a printed copy of the said bill should be received and filed as of

the 2d day of February, 1856. And it was ordered that the plaintiff should pay to the defendants their costs of the application on which the order was made, and that, notwithstanding the said general orders, no costs should be taxed or paid to the defendants by reason of a printed copy of the bill not having been actually filed on or before the 2d day of February, 1856.

* 95 * *Mr. Lloyd and Mr. Currey*, in support of the appeal. —

There is no discretion given to the Court by the order in question, as is the case in some others of the same set of Orders of 1852, such as the 25th, 26th, and 27th, which prescribe certain rules as to motions for decree, unless the Court otherwise orders. And the 46th Order, which will be relied upon on the other side, only provides that the power of the Court to enlarge or abridge the time for doing any act shall be unaffected by the orders. This does not apply to the 3d Order, then for the first time introduced; and it certainly does not authorize the Court to dispense with the provisions of the 3d Order as to costs. On the contrary, by the provision as to time it implies that in other respects the Court has not jurisdiction to dispense with the orders.

They referred to *Calvert v. Gandy*, (a) *Bartlett v. Hartan*, (b) *Hannam v. South London Water-works Company*. (c)

Mr. R. Palmer and Mr. H. Cadman Jones were stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE. — In my opinion the Master of the Rolls has not only not exceeded his jurisdiction, but has exercised it reasonably and wisely. I think that this motion ought never to have been made, and should be dismissed with costs.

THE LORD JUSTICE TURNER. — I have no doubt of the power of the Court to dispense with these general orders when the circumstances and the justice of the case require; and though the provisions * of the 46th Order may at first sight seem to imply that the power of dispensing with the general orders does

(a) 1 Ph. 518.

(b) 17 Jur. 1019.

(c) 2 Mer. 61.

not exist in cases to which that order does not extend, I think that those provisions are accounted for by the fact of there being many cases of limitations of time in the general orders which might have led to misapprehension but for the 46th Order.

HALLIDAY v. TEMPLE.

1856. February 19. Before the LORDS JUSTICES.

Where a plaintiff set out in his bill a letter written by the defendant, and stated that it was the plaintiff's intention to prove and put in evidence all letters which had passed between him and the defendant on the subject of the transactions in question, if so advised: *Held*, that the defendant was not entitled, before putting in his answer, to move for the production of the plaintiff's documents.¹

THIS was an appeal from the refusal with costs by the Master of the Rolls of a motion on behalf of the defendant for the production of documents in the possession or power of the plaintiff before the defendant had put in his answer.

The bill stated that the defendant was a stock and share dealer, and that on the 25th of November, 1853, the plaintiff was the holder of two shares in a mine called the South Caradon Mine, worked by a company formed on the cost-book principle. That the defendant advanced to the plaintiff 500*l.* on the plaintiff signing and delivering to the defendant as a security for the repayment of that sum an authority to the purser of the mine for a transfer of the two shares. That the defendant had, without the consent of or knowledge of the plaintiff and in violation of the terms on which the shares had been transferred to him, transferred one of the shares to some person unknown to the plaintiff, and that the person to whom the defendant transferred the share had sold it for 395*l.*, and paid that sum or otherwise accounted for it to the defendant. That the defendant had proposed that the plaintiff should pay him 250*l.* (being one-half of the loan of 500*l.*) with interest on the whole of the loan, and that the defendant should

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1820.

* 97 thereupon * transfer to the plaintiff one share in the mine, and that the defendant also undertook, with all convenient speed, to procure and transfer to the plaintiff another share in the mine, and proposed that in the mean time the remaining 250*l.* should remain owing to him without interest, he undertaking from time to time to pay to the plaintiff sums equal in amount to any dividends which might be declared in respect of the shares. That the plaintiff acceded to the defendant's proposal, and accordingly paid to the defendant 250*l.*, with interest on the 500*l.* for two months, and that the defendant transferred into the name of the plaintiff the share which remained in the defendant's possession. The bill then charged as evidence of the terms of the proposal so made by the defendant, that among other correspondence which passed between the plaintiff and the defendant relating to the aforesaid transactions, the defendant in or about the month of August, 1854, wrote and sent to the plaintiff a letter which was set out in the bill. That the defendant had not, in pursuance of his undertaking, caused to be transferred into the name of the plaintiff another share in the mine, and that the plaintiff had from time to time, both verbally and in writing, urged the defendant to perform his undertaking and to transfer to the plaintiff a share in the mine, and to account for the aforesaid sums in lieu of dividends, but without effect; and that the plaintiff intended, if he should be so advised, to prove and put in evidence in the suit all the letters which had passed between him and the defendant on the subject of the transactions. The prayer was for an account of what was due from the defendant to the plaintiff in respect of dividends on the footing of the arrangement, and that the defendant might be ordered to pay to the plaintiff what should be so found due, and

* 98 to procure and transfer to the plaintiff a share in the * mine or otherwise to account to the plaintiff for the proceeds of the sale of the share.

Mr. Anderson and *Mr. G. W. Collins*, in support of the appeal. — Under the old practice of the Court the defendant might have obtained an order, that he should not be compelled to answer till he had had an inspection of the documents referred to in the bill. *Princess of Wales v. Earl of Liverpool.* (a) This was in

(a) 1 Swans. 114, 580; 3 Swans. 567.

conformity with the general rules of evidence, according to which a witness cannot be asked as to what he has written without the writing being produced to him. *Sainthill v. Bound.* (a) So in this Court a defendant cannot be asked to answer as to letters written by him without his having an opportunity of seeing them. The rule is thus laid down by Lord LANGDALE in *Taylor v. Hemming*: (b) "If a plaintiff refers in his bill to documents in his possession as forming part of his case, then, whether he does or does not offer to produce them, he cannot call on the defendant to answer until he has seen the documents which are necessary for his answer. The Court has acted on that principle from the earliest period, (c) and the case of the *Princess of Wales v. The Earl of Liverpool* was by no means the first case on the point. Judges of great experience have said that they could never understand on what principle that case was founded, (d) but I believe it is founded on principles which, upon examination, would fully support it."

In that case, however, Lord LANGDALE held, that he had no jurisdiction to order the plaintiff to produce the * documents, * 99 and only made an order that the defendant should have a month's time to answer after their production. The Chancery Practice Amendment Act (15 & 16 Vict. c. 86), § 20, has removed this difficulty, and has enabled the Court to order the production of the plaintiff's documents at the instance of the defendant. That section, it is true, says, that the order shall not be made until after the defendant has put in a full and sufficient answer to the bill, unless the Court shall make order to the contrary. But this is a case in which justice requires the Court to make an order to the contrary, it being one in which the plaintiff calls on the defendant to answer as to letters written by him without giving him an opportunity of seeing them. If the motion is refused, the answer may be open to exception, and the defendant deprived of any benefit arising from the letters.

Mr. C. T. Simpson, for the plaintiff, on being asked by the Court whether the plaintiff would consent to produce the letter set out in the bill, agreed to give the consent without prejudice to any question as to costs, and he was not further called upon.

(a) 4 Esp. 74.

(b) 4 Beav. 237.

(c) See Wy. Pr. Reg. 161, and *Jones v. Lewis*, 2 Sim. & St. 242.

(d) See 5 Sim. 510.

THE LORD JUSTICE TURNER. — This is an application on the part of the defendant to see the evidence on which the plaintiff founds his case before the defendant puts in his answer. I hardly know any thing which might be productive of more mischief than to accede to such an application. In a case of alleged fraud, if the Court were to compel the plaintiff to produce the evidence on which he founds his charge before the defendant puts in his answer, the defendant would be enabled to shape his defence according to the evidence which he knew to be in the plaintiff's possession. In this bill there is no allegation as to * 100 * documents, except as to letters between the plaintiff and defendant on the subject of the transactions in question, and those letters the plaintiff intends, if so advised, to put in evidence. I think the application entirely at variance with principle and with the practice of the Court. Motions have been made under the old practice by defendants for production of documents by the plaintiff, but the Court has always refused them, and although in one or two cases, under special circumstances, time has been given to defendants to answer till documents were produced, such orders are not according to the ordinary practice of the Court. I think that the fact of a letter being stated in the bill does not enable the defendant to compel its production.

The Lord Justice KNIGHT BRUCE concurred, and the motion was refused, with 10*l.* for the costs below and on appeal, the plaintiff undertaking to produce the letter set out in the bill.

EVANS v. BREMRIDGE.¹

1856. February 22, 23. Before the LORDS JUSTICES.

Where a surety joined in a covenant on the understanding that an intended co-surety, who was purported to be made a co-covenantor, would execute the deed containing the covenant, but he failed to do so, and the covenantees nevertheless advanced the money purported to be secured by the deed: *Held*, —

¹ S. C., 2 Jur. N. S. 311; 25 L. J. Ch. 334.

1. That the surety who executed the deed was entitled to an injunction against proceedings at law upon it.¹
2. That he had not lost his right by setting up this defence at law by equitable plea, to which the covenantees demurred in such a way as might leave the equitable ground untouched.²

THIS was an appeal from the decision of Vice-Chancellor Wood, reported in the second volume of Messrs. Kay and Johnson's Reports, (a) holding the plaintiff to be discharged from a contract of suretyship, by reason of an intended co-surety not having joined in the suretyship deed.

In January or February, 1849, the Rev. George * Elton applied to the Anchor Assurance Company for * 101 the loan of 210*l.*, which they consented to make upon the terms that Mr. Elton should effect a policy of assurance on his life for 400*l.*, and assign it to trustees for the company, and should procure two responsible persons to join him in covenants for repayment of the loan and interest by instalments, and for the payment of the premiums on the policy of insurance. Mr. Elton thereupon requested the plaintiff to become one of the sureties, stating that Mr. Bradley, Mr. Elton's uncle, would be the other. The plaintiff consented, and the names of the plaintiff and Mr. Bradley were given to the company as those of the proposed sureties.

The company accordingly prepared a policy and an indenture dated the 22d of February, 1849. The indenture was expressed to be made between Mr. Elton, therein called "the borrower," of the first part, the plaintiff and Mr. Bradley (described as sureties of the borrower) of the second part, and the defendants James Bremridge, John Wertheimer, and Thomas Wilson of the third part. It witnessed, that in consideration of 210*l.* to the borrower

(a) Page 174.

¹ See *Kerr Inj.* 70. See *Cutter v. Whittemore*, 10 *Mass.* 442. But a surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. *Cooper v. Evans*, L. R. 4 *Eq.* 45.

² See *Kerr Inj.* 25-27; *Waterlow v. Bacon*, L. R. 2 *Eq.* 514; 1 *Dan. Ch. Pr.* (4th Am. ed.) 552, 2 *ib.* 1625; *Druiff v. Lord Parker*, L. R. 5 *Eq.* 131; *Stewart v. Great-Western Railway Co.*, 3 *De G., J. & S.* 319.

paid by the parties of the third part immediately before the execution thereof, the borrower assigned unto the parties of the third part, their executors, administrators, and assigns, the policy, subject to a proviso for redemption; and the borrower and the parties of the second part for themselves, their heirs, executors, and administrators, jointly and severally covenanted with the parties of the third part, their executors, administrators, and assigns, that they, the parties of the first and second parts, or some or one of them, their or some or one of their executors or administrators, would pay to the parties of the third part, their executors, administrators, or assigns, the instalments and interest on the several days therein mentioned; and that if default should

* 102 * be made in payment of any or either of the instalments and interest, or any part thereof as aforesaid, then that they the parties of the first and second parts, or some or one of them, their or some or one of their executors or administrators, would pay to the parties of the third part, their executors, administrators, or assigns, upon request, the whole of the principal sum and interest, or so much thereof as should remain unpaid; and that the parties of the first and second parts, or some or one of them, their or some or one of their executors or administrators, would from time to time during the life of the borrower, until all moneys purported to be secured by the deed should be fully paid and satisfied, pay the premiums, duty, and expenses which ought to be paid for keeping the policy on foot, and for effecting and keeping on foot every renewed and substituted policy.

Mr. Elton did not pay the instalment which became due on the 22d of August, 1849, and the manager of the company on the 11th of September, 1849, sent to the plaintiff the following letter:—

“ September 11th, 1849.

“ Sir, — The Rev. G. Elton having failed to pay up the arrears due on the loan advanced to him by this office, I am directed by the board to apply to you as one of his sureties for the immediate payment of the same, in order to prevent instructions being given to our solicitor to recover the entire amount remaining due to the company.

“ I am, sir, your obedient servant,
“ JNO. R. DALBY, *Manager.*”

In reply to this application the plaintiff, who was then the solicitor of Mr. Elton, acting upon his representations, applied for delay until the then following Christmas, to which request the company acceded.

* At the following Christmas the property of Mr. Elton * 103 was sold and did not produce sufficient to enable him to make any payment to the company.

The plaintiff then instructed his London agent to call at the office of the company, and ascertain the address of Mr. Bradley, but on the agent calling there on the 19th of January, 1850, he ascertained that Mr. Bradley had never executed the indenture.

This information was the first knowledge or notice of any kind which the plaintiff had that Mr. Bradley had not executed the indenture. On making the discovery the plaintiff insisted that he was not liable upon the deed, or at all events was not liable for more than half of the moneys secured by it.

On the 19th of June, 1855, the defendants delivered to the plaintiff a declaration in an action, seeking to recover from the plaintiff 210*l.*, with interest thereon from the 22d of August, 1849, and a premium of 19*l.* 14*s.* 8*d.* which became payable on the policy on the 22d of February, 1850.

On the 27th of July, 1855, the plaintiff in equity pleaded in the action, by way of defence on equitable grounds, that before the plaintiff executed the deed, he had been applied to by Mr. Elton to execute such a deed, and thereby to become surety for Mr. Elton jointly with some other person as co-surety for Mr. Elton, and that the plaintiff in equity consented and agreed so to do, but never consented or agreed to become such surety alone or without such co-surety, of which premises the plaintiffs in the action, before they paid to Mr. Elton the sum of 210*l.* in the deed mentioned to have been paid to him, had notice; and that at the time when the plaintiff in equity executed the deed he had not any * notice * 104 that the same was not to be or would not be executed by Mr. Bradley, but that on the contrary he executed the same upon the faith and in the belief that the same would also be executed by Mr. Bradley before the money in the deed in that behalf mentioned was lent or advanced to Mr. Elton, as the plaintiffs in the action then well knew; and that a reasonable time for Mr. Bradley to execute the deed had long since elapsed, but that he had not at any time executed the deed; and that no other person had become

co-surety for Mr. Elton in a similar manner to the plaintiff in equity, or any other manner whatsoever; and that in case the plaintiffs in the action should recover in that action, the plaintiff in equity would not have any right of action for contribution against any person whatsoever other than Mr. Elton, and that the 210*l.* was lent and advanced by the plaintiffs in the action to Mr. Elton without the knowledge or consent of the plaintiff in equity, except such as resulted from the fact of his having consented to and having in fact executed the deed under the circumstances in the plea mentioned, and that he had no knowledge or notice whatever that Mr. Bradley had not executed the deed until the month of January, 1850, and then objected that the said deed was not binding on him in equity, and that he had never waived such objection.

On the 1st of August, 1855, issue was joined on the plea, and the plaintiff in the action also demurred to the plea, on the ground, amongst others, that it did not appear that the plaintiff in equity had made it a condition that his execution should be void if the indenture were not executed by some other surety, or that the plaintiff in equity would not have executed the same if he had known that he was to be the sole surety, or that the intended execution of the deed by another surety was not exclusively

* 105 for the benefit and better security of * the plaintiffs in the action, it appearing to have been entirely in their discretion who (if any one) should be co-surety with the plaintiff in equity, and it appearing that the plaintiff in equity, with knowledge that the other person intended as a surety had not executed, had waived any objection on that ground, and assented to be bound by the deed.

On the 4th of August, 1855, the plaintiff delivered a rejoinder and joinder in demurrer, but no further proceedings had been had in the action.

The plaintiff in equity then filed his bill in the present suit, and charged that, even if the company were justified in making the said advance prior to the execution by Mr. Bradley of the mortgage, they were bound and ought to have communicated the failure of Mr. Bradley to execute the same within a reasonable time after the 22d of February, 1849, and that if they had done so the plaintiff would have been enabled to take measures to compel Mr. Elton to discharge his liability to the company, and that they did not do

so until the plaintiff caused inquiries to be made as above mentioned, but, on the contrary, treated the plaintiff as one of two or more sureties. The prayer was, that it might be declared that the plaintiff in equity was discharged from all liability under the indenture, and that it might be decreed to be cancelled, so far as the plaintiff was concerned, or that at all events it might be declared that the plaintiff was not liable in equity for more than one equal moiety of the moneys due under the indenture, which he was ready and willing and thereby offered to pay if the Court should be of opinion that he ought so to do, and that upon such payment the said indenture might be cancelled so far as the plaintiff was concerned. The bill also prayed for an injunction against further prosecution of * the action and any other proceed- * 106 ings at law upon the indenture.

The Vice-Chancellor having made a decree in substance according to the prayer, the defendants appealed from the whole decree.

Mr. Rolt and *Mr. Southgate*, for the plaintiff. — First, the plaintiff is not prevented from proceeding in equity by having pleaded an equitable plea; the Common Law Procedure Act not having taken away the jurisdiction of this Court, and no decision having been given at law on the equitable question, which, indeed, could not by reason of the technicalities of pleading at law be fairly decided in a Court of Law. Next, upon the merits, the only question is, whether the plaintiff is discharged wholly or as to a moiety only of the debt, and consequently the appeal from the whole decree must fail. And the question is disposed of both by principle and authority in the plaintiff's favour.

They referred to *Underhill v. Horwood*, (a) *Leaf v. Gibbs*, (b) *Rice v. Gordon*, (c) *Pidcock v. Bishop*, (d) *Whitcher v. Hall*, (e) *Bonser v. Cox*. (g)

Mr. Willcock and *Mr. Shapter*, for the appellant. — The objection on the ground of the equitable plea is not that the matter is *res adjudicata*, or that this Court is deprived of its jurisdiction, but that it is inconvenient for exactly the same matter to be

(a) 10 Ves. 225.

(b) 4 Car. & P. 466.

(c) 11 Beav. 265.

(d) 3 B. & C. 605.

(e) 5 B. & C. 269.

(g) 4 Beav. 379.

* 107 in course of litigation * between the same parties simultaneously in different Courts of co-ordinate jurisdiction. If a plaintiff were suing in two such Courts, he would be compelled to elect, and this Court will, for the same reason, decline to interfere in favour of a defendant who has set up his equitable case before another Court, which has jurisdiction to deal with it.

[They referred to *Mines Royal Societies v. Magnay*, (a) *Harrison v. Nettleship*, (b) *Jones v. Geddes*, (c) *Wodehouse v. Farebrother*, (d) *Farebrother v. Welchman*, (e) *Prothero v. Phelps* (g) *Carron Iron Company v. Maclaren*. (h)]

Upon the merits it does not appear whether in *Rice v. Gordon*, (i) the facts resembled those of the present case, nor has *Bonser v. Cox* any application to it. On the other hand, *Austen v. Howard* (k) shows that the plaintiff is at all events liable for half, a consequence which indeed follows, from the fact that the defendants might have released the co-surety at any time without destroying their rights against the plaintiff for one-half. *Ex parte Gifford*, (l) *Stirling v. Forrester*, (m) *Peto v. Peto*. (n). Neither *Underhill v. Harwood* (o) nor *Nicholson v. Revill* (p) is adverse to this proposition.

They also referred to *Re Semple*, (q) *Latch v. Wedlake*. (r)

* 108 * [The Lord Justice TURNER referred to *Dering v. Lord Winchelsea*. (s)]

Mr. *Rolt* was not called on to reply.

- | | |
|---|-----------------------|
| (a) 10 Exch. 489. | (d) 5 E. & B. 277. |
| (b) 2 Myl. & K. 428. | (e) 3 Drew. 122. |
| (c) 14 Sim. 606; 1 Phil. 724. | |
| (g) 7 De G., M. & G. 722; 16 C. B. 370. See also <i>Davies v. Stainbank</i> , | |
| 6 De G., M. & G. 679. | |
| (h) 5 H. L. Cas. 416. | (o) 10 Ves. 227. |
| (i) 11 Beav. 265. | (p) 4 A. & E. 675. |
| (k) 7 Taunt. 28, 327. | (q) 3 Jo. & Lat. 488. |
| (l) 6 Ves. 805. | (r) 11 A. & E. 959. |
| (m) 3 Bli. 590. | (s) 2 Cox, 318. |
| (n) 16 Sim. 590. | |

THE LORD JUSTICE KNIGHT BRUCE. — The defendants seek to charge the plaintiff with a contract into which he did not enter. They claim a right to judge and decide for him, that the execution by Mr. Bradley of the instrument in question was a matter of indifference to the plaintiff, except possibly as to a moiety of the debt or demand professed to be constituted by it. The plaintiff, however, was and is entitled to judge and decide upon that for himself and to say effectually (without proving) that independently of the mere title to contribution as between sureties, he had reasonable grounds for thinking it important to him, and desiring that Mr. Bradley should be associated with him.

There has been no judgment at law, and the pendency of the action is, as well as the pleadings in it, at least in a case circumstanced as is the present, immaterial, unless, perhaps, with regard to costs, notwithstanding the stage at which the action was when the bill was filed. But I conceive that in the circumstances of the matter, there ought to be no costs at law on either side, that all proceedings in the action should be stayed, that there should be an injunction against suing the plaintiff under the deed, and that the defendants should pay the costs here, including those of the appeal.

THE LORD JUSTICE TURNER. — There are two points raised in this case: First,* whether having regard to the * 109 Common Law Procedure Act the Court, supposing the plaintiff to be right on the merits, ought to interfere in his favour; secondly, whether on the merits, the plaintiff ought to be wholly discharged from liability or to be held liable for half the sum secured. With respect to the former of these points, I do not mean to say that in every case in which an equitable defence has been pleaded at law this Court will interfere by injunction to restrain proceedings in the action on the ground which has been pleaded at law, but in this case I feel no doubt as to it being the duty of this Court to interfere. For really the point to be decided at law on the pleadings, as they stand, is one of common-law pleading, and the merits raised by the equitable plea may never be reached. There may be a judgment upon the demurrer at law for the plaintiff at law, on the formal ground that the defendant at law has not pleaded, that he would not have executed the bond had he been aware that it would not be executed by the co-surety.

I cannot think that the equitable rights of the plaintiff in equity ought to be disposed of by the result of these pleadings at law.

On the second point, I agree with the Lord Justice KNIGHT BRUCE. Several cases were cited in the argument. I do not think it necessary to discuss them, for I concur in thinking that as the plaintiff entered into the obligation upon the understanding and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety.

1856. February 14, 15, 26. Before the LORDS JUSTICES.

A father executed a voluntary deed, assigning a considerable portion of his property to his sons, with the concurrence and by the advice of his brother, to whom he was largely indebted.¹ He also made his will appointing his sons and his brother executors and trustees. The brother acted under the will until his death, which took place seven years after that of the testator. He never took any step to impeach the voluntary deed, but was a party with the donees under it to instruments and transactions proceeding on the assumption of its validity: *Held*, that, after his decease, his representatives could not impeach the deed, as being void against creditors under the 13 Eliz. c. 5.²

A plaintiff, in a creditors' suit, held not entitled to set up at the hearing a vendor's lien in respect of his debt, without having adapted the frame of his bill to such a case.

This was an appeal from a decision of Vice-Chancellor Wood, holding a voluntary deed executed by the testator in the cause to be void against his creditors.

The suit was instituted by the executors of the testator's brother on behalf of themselves and all other creditors of the testator. The bill sought the usual accounts, and that a deed of gift made by the testator of some leasehold and other personal property to

¹ As to voluntary settlements by parties indebted at the time, see *Skarf v. Souby*, 1 Mac. & G. 364, and note (2) and cases cited.

² See *Sugden V. & P.* (14th Eng. ed.) 706, n. (1); *Kerr Inj.* 40 *et seq.*, 201 *et seq.*

his sons might be declared void as against the creditors of the testator, and that the property comprised in it might be applied in payment of the testator's debts.

James King, the testator in the cause, was a brewer at Southampton, and had in the year 1839, become sole owner of his brewery by purchasing the share from his brother John King, who was the plaintiff's testator. It was to secure the purchase-money for this share that, on the 6th of April, 1839, the testator in the cause had given the plaintiff's testator a bond for £11,000, of which £1000 had been paid off, and of which the remainder constituted the debt on which the bill was founded.

The property of which the share was thus purchased was part freehold and part leasehold. Having purchased *and * 111 become possessed of the entire brewery, James King on the 6th April, 1839, took his son John Richard King (one of the defendants) into partnership, giving him one-quarter of the profits of the business, but not conveying to him any portion of the freehold and leasehold property belonging to the brewery.

Upon the same 6th of April, 1839, John King made his will, thereby devising both the freehold and leasehold parts of the brewery and the plant and all the property belonging to it, to his two sons, John Richard and Morris King. He devised other parts of his freehold and leasehold estates (which were considerable) to his wife for her life, with remainder to his four daughters.

After making his will, he continued to carry on the business in partnership with his son John Richard King. In the end of the year 1841, he was attacked by a serious illness. It appeared that he had at all times great confidence in the judgment of his brother John King, and that early in April, 1842, he consulted John King upon the subject of his affairs: the result of that consultation was, that on the 6th of April, 1842, he executed the deed in question, which was dated the 6th of April, 1842, whereby he assigned to his two sons John Richard King and Morris King the whole of his leasehold property which belonged to the brewery, and all his other leasehold estates and also the debts which were due to the brewery. By a codicil he altered in some respects the disposition of the property, which he devised in favour of his wife and daughters, directing a sale and creating a trust of the proceeds for them, and he appointed his brother John King and his two sons executors and trustees.

He died on the 17th of April, 1842. Soon after his death a portion of the freehold estate which had been given to the wife for life with remainder to the daughters, and which by the codicil had been made subject to the trust for sale, were sold together with a piece of land (about three acres), part of the leasehold property which had been comprised in the voluntary deed of the 6th of April, 1842. A portion of the estate devised in trust for the wife and daughters was sold very soon after his death for 5500*l*. Mr. John King as a devisee in trust under the codicil concurred in the sale. Distinct conveyances were made of the freehold and of the leasehold property, and the assignment of the leasehold property recited the title under the deed of gift to the three acres of land just mentioned. The purchase-money was applied in paying off mortgages which affected other parts of the estates, and also in paying 800*l*., which, together with 200*l*. advanced by the sons themselves, was applied in paying off 1000*l*., part of the 11,000*l*., the bond debt due to John.

Soon after the sale, a mortgage which there was upon the brewery was transferred. The original mortgage was paid off and a new mortgage created for the same amount, and the sons by the new mortgage covenanted for payment of the mortgage debt. The same course of dealing took place again with the leasehold property, which was dealt with as held under the deed of gift. The residuary account was also passed at the stamp office, and upon that account no mention was made of any title to any of the leasehold property.

The leases belonging to the brewery were renewed, and the fines upon those renewals were paid by the sons. Other transactions also took place in the nature of transfers of mortgages successively from time to time. Upon each of those occasions the same course was pursued.

* 113 * In the year 1848, John Richard King and Morris King, who had carried on business in partnership together according to what appeared to be the intent of the deed of gift, dissolved that partnership, John Richard carrying on the business and covenanting to pay Morris 500*l*.

In the year 1849, John King, the obligee in the bond, died without having done any thing to question the title under the deed of gift.

In the year 1853, the bill in the present suit was filed by the

executors of John King, raising the question, whether the deed of gift was or was not fraudulent and void as against the creditors of James King.

The decree, from part of which the present appeal was brought, contained the usual directions for the administration of the real and personal estate, and against that part of the decree no complaint was made, but the decree also declared that the deed of the 6th of April, 1842, was fraudulent and void against the creditors, and that the property comprised in that deed ought to be applied in payment of the testator's debts after the application of the personal estate and of the devised real estate. It was from this portion of the decree the appeal was presented.

Mr. Daniel and *Mr. Elderton*, in support of the appeal. — They referred to *Steel v. Brown*, (a) *Baldwin v. Cawthorne*, (b) *Ex parte Harvey*, (c) *Tope v. Hockin*. (d)

Mr. Rolt and *Mr. Grove*, for the plaintiffs, and *Mr. Giffard*, for another respondent. — The concurrence of John in acts done under the will * amounted to no waiver of his para- * 114 mount right as a creditor. Subject to the debts the settlement was valid, and no act done by John recognized its validity as against creditors. A voluntary deed is called fraudulent, but merely in the sense of being inoperative against purchasers for value and creditors, just as a will is against creditors under the statute of fraudulent devises. Neither instrument is fraudulent in the ordinary meaning of that word, nor would a creditor lose his rights against a testator's property by having recommended him to devise it or by afterwards recognizing the validity of the will. At all events John King's estate is entitled to a lien on the share of the brewery for his debt, which consists of unpaid purchase-money.

They referred to *French v. French*. (e)

Mr. Daniel replied.

Judgment reserved.

(a) 1 Taunt. 381.

(b) 19 Ves. 167.

(c) 4 De G., M. & G. 881.

(d) 7 B. & C. 101.

(e) 6 De G., M. & G. 95.

February 26.

THE LORD JUSTICE KNIGHT BRUCE. — How this cause would have stood if the plaintiffs had sued, not as they do in the character of executors of Mr. John King, but had been creditors of Mr. James King, in some other right having no connection with Mr. John King in point of interest, and suing accordingly, I need not and I do not state any opinion. For the suit is by the plaintiffs in right of Mr. John King, as creditors of Mr. James King, in respect merely of a debt that he owed to Mr. John King.

Nor have we before us a case in which any portion of
 * 115 * Mr. John King's proceedings or conduct that is in evidence can be ascribed to error or mistake on his part, or to ignorance on his part, or to any misrepresentation made, if any was made, at any time to him. For there is no proof that he acted upon any occasion in error or mistake, or in ignorance of any fact material for him to know, or that any misrepresentation was ever made to him. And, since he joined in 1842 in proving the will, and was an acting, indeed, as it seems, an active executor of Mr. James King, it must be taken that Mr. John King was in 1843, the year in which the residuary account was passed at the stamp office, well aware of the true state of the affairs of his brother, who died in April, 1842, and was survived during seven years and more by Mr. John King, the time of whose death in 1849 was three or four years before the commencement of the present litigation. But he never disputed or questioned the validity of the deed now in controversy, that of the 6th of April, 1842, an instrument of which at no time after it came in that year into existence was he unaware, and to the making and executing of which he was indeed contemporaneously and actively instrumental. And on the contrary, upon more than one occasion after Mr. James King's execution of the deed in 1842, Mr. John King, to the knowledge contemporaneously of the appellant John Richard King, did various acts which, recognizing the deed as valid and effectual, must necessarily have led the appellant John Richard King to believe that Mr. John King did not dispute and had no intention of disputing its validity or efficacy; and John Richard King's conduct, in more than one instance of importance to him after one or more of those acts, appears to have proceeded on his belief of the validity and efficacy of the deed.

I am, on the grounds to which I have referred, of
 * opinion that it is not just or reasonable that Mr. John * 116
 King's executors should now as plaintiffs attempt to im-
 peach the deed, which must, I think, for all the purposes of this
 their suit, be taken to be in force and binding. The bill should
 accordingly, in my opinion, be so far dismissed.

It was contended or suggested at the bar that the debt due to
 the plaintiffs, being wholly or in part constituted of the unpaid
 purchase-money of a moiety of certain property of which a portion
 is included in the deed of the 6th of April, 1842 (that moiety having
 been sold by the testator John King to his brother), the plaintiffs
 are entitled to a lien accordingly upon some portion at least of
 Mr. James King's property, and upon some portion at least of the
 property comprised in the deed ought to have that alleged lien
 provided for. There may not or may have been, there may not or
 may be, a title to such a lien. Upon that point I give no opinion.
 But I am satisfied that the bill is not adapted to any such case or
 object, and was not so intended. The decree therefore, in my
 opinion, rightly omitted to make any provision in this respect.

The Lord Justice TURNER, after stating the facts of the case,
 said: Upon the best consideration that I have been able to give
 to this case, I dissent from the opinion which his Honor the Vice-
 Chancellor has expressed. I dissent from it, as I always do from
 any judgment of Vice-Chancellor Sir WILLIAM PAGE WOOD, with
 the greatest diffidence and distrust of my own judgment, but I
 confess that I entirely dissent from it.

It is not, I think, necessary to examine into the facts
 * which occurred subsequently to the death of James King. * 117
 The examination of those facts if entered into would, in my
 judgment, tend rather to confirm the case on the part of the de-
 fendants than to diminish the weight which is due to that case.
 Those facts might possibly displace a right in John King, if he
 originally had the right, to impeach the settlement; but in my
 opinion, they cannot in any way tend to create a right in John
 to impeach the settlement, if he had not originally that right;
 and upon the best consideration which I can give to this case, I
 think that he had not originally any right to impeach this settle-
 ment.

The deed was suggested by John, was prepared according to

the instructions given by John, John himself procured the execution of it by James, and by John Richard and Morris, the sons of James. The whole transaction appears to have been one carried through, in fact, by the acts and concurrence of John. At all events the deed was executed with his full consent and concurrence, and I think that he could not have been permitted to say (and if he could not have been, his executors cannot be) that the deed thus executed with his full consent and concurrence was a fraud upon him within the meaning of the provisions of the Stat. 13 Eliz. c. 5.

It is to be observed that the statute lays very heavy penalties upon persons who maintain deeds which have been so obtained, and I think that I have heard Lord ELDON refer to those penal clauses as proper to be taken into account in considering the question whether or not a settlement ought to be considered fraudulent

within the meaning of the statute. Could it possibly be * 118 within * the view or contemplation of these parties that if the two sons of James should support and maintain that settlement as against the creditors, they should be made subject to the penalties imposed by the Act upon parties maintaining such deeds?

Without resting upon this ground, the cases in this Court are abundantly strong upon the point, that parties who by their silence have led others to act in opposition to their rights, cannot afterwards set up those rights as against those whom they have induced to act in opposition to them. They certainly cannot do so where the effect of the acts done is to alter the position of the parties. The case of *Teasdale v. Teasdale* (a) may perhaps be well referred to on this point. In that case a son, supposing himself to be tenant in fee, made a settlement upon his marriage. He limited a jointure in favour of his wife, and covenanted for payment of that jointure. It turned out that the son, instead of being tenant in fee, was tenant for life only, and that the father was tenant in fee. The father had concurred in the settlement and had himself attested it. The son died and left personal estate to the amount of 3000*l.*, and left his widow his executrix, and entitled to that personal estate; and then came the question whether the settlement was or was not good as against the father, who, had

(a) Select Ca. in Ch. 59.

been a party to and attested that settlement. It was said that the father did not know of his title. That was one part of the case, and makes it an exceeding strong one. The Lord Chancellor says: "I shall make no difference whether he knew of his title or not at that time, considering the near relation of father and son. It is plain it was thought the son had the fee, and had it been known that it was in the father it would have been insisted on that he * should have joined, else the marriage * 119 would not have been had. As he knew of the settlement, he shall not take advantage against it." Then it was insisted that she should be obliged to have recourse to the covenant against the personal estate, and that it would be very hard to make a person suffer for ignorance of his title, when she may have ample satisfaction against the personal estate, whereby equal justice will be done and she will have the fruit of her agreement. But the Chancellor said he would complete her jointure, for that was what was intended to be had, and he would not oblige her to have recourse to the covenant. It is true that that was a case of settlement for valuable consideration, and so far distinguishable from the present case, but the principle equally applies if it appears that the parties have been led into a different position.

Now this case is much more strong than the case of *Teasdale v. Teasdale* and cases of that class, because here there was not only a standing by and seeing a voluntary settlement made by James, but there was an actual concurrence in that settlement by John, for John himself procured the execution of the settlement both by James and by the children of James; and with respect to the position of the parties, it is plain that the object which James had in view at that time was to make a complete settlement of his affairs by this deed and by the codicil to his will; and who can tell what dispositions he would have made by that codicil to his will if, instead of having sanctioned and concurred in the arrangement with respect to the assignment of the leasehold property, John had said: "You have no right to assign the leasehold property. I shall insist and claim the 11,000*l.* which is due to me as against the leasehold property, and will say that the deed is fraudulent and void against me"? It is impossible to foresee what alterations might have * been made or what change * 120 might have taken place in the position of the family in that case.

It is, however, said that James had a right to make a settlement of the property, subject to his debts. No doubt he had; and if he had made a settlement without John's concurrence, John might unquestionably have impeached it. But the question to be considered is, not whether James had a right to make the settlement, but what is the effect of John's concurrence in the settlement. Suppose John had executed the deed for the purpose of testifying his consent to the transfer of the leasehold property by that deed, could he then have impeached the deed? I apprehend that he clearly could not; and if he could not, there is nothing which he has done falling short of the execution of that deed, except that there is not his pen put to the paper by which that property was transferred.

I think, therefore, that, as he could not have impeached the deed if he had actually executed it, neither could he have impeached it under the circumstances of concurrence on his part, which are in evidence in this case. If he could not have impeached it, of course his executors cannot. Even if he could have done so I am not satisfied that his executors could. When he had lived for a period of seven years, leaving this settlement unimpeached, I am not sure that he might not be taken to have elected to abide by it. I am not confident that the executors claiming under him could have instituted proceedings which he himself did not think proper to institute. I give no opinion, however, on that point, further than to say I am not satisfied upon it.

My opinion is based upon this: I consider the true effect * 121 of this transaction to be, that John by his conduct * agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained.

It is said that the property has been dealt with as if it were assets. I am by no means satisfied that this is the case. Upon an examination of all these deeds, all of which I have read through with some care, I am rather impressed with the notion that the leasehold property has been sufficiently kept distinct throughout. But, at all events, it is perfectly clear that the mode of dealing with the assets was not such as could create any contract between John and the two sons of James that the property should be liable for the debts; and, if it did not create a contract between John and the sons of James, I do not see how it could create any right

in the plaintiffs upon those assets, because the sons being entitled to the property might deal with it as they pleased.

On these grounds I dissent most respectfully from the judgment which the Vice-Chancellor has given in this case; and I think, therefore, that the decree must be altered so far as it goes to affect the property comprised in the settlement.

A question was raised as to a lien for the unpaid purchase-money; I do not think that that question is properly raised by this bill. This is a bill seeking payment out of the assets of the testator, and the assets only. The property in question is no part of the assets of the testator. The other creditors, on whose behalf as well as their own the plaintiffs are suing, have nothing whatever to do with any such lien as the plaintiffs claim. The case is not like the ordinary case of a mortgagee filing a bill for the administration of assets, because the lien (if any) is upon property which has been alienated by the testator in his * lifetime. I do not think the point, therefore, open upon * 122 the pleadings.

The bill must be dismissed as far as relates to impeaching the voluntary settlement.

OSBORNE v. FOREMAN.¹

1856. March 3. Before the LORDS JUSTICES.

A sale took place under a decree by tender, made pursuant to an advertisement, which stated that the sale was to be subject to the contract receiving the sanction of the Judge, and to conditions, one of which was, that the certificate of sale would in due course be signed and filed, and become binding without a further notice or expense to the purchaser. On the 8th of February, the appellant was certified by the chief clerk to be purchaser. A summons was taken out on the 12th by a respondent seeking to open the biddings offering an advance, and was on the 13th served on the appellant. The certificate was signed on the same day by the Judge: *Held*, that the Court was not precluded from opening the biddings and reselling.²

¹ S. C. *nom.* Barlow v. Osborne, 6 H. L. Cas. 556; 4 Jur. N. S. 367.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1285 *et seq.* The former practice of opening biddings on an offer of a large price has been discontinued in England. 30 & 31 Vict. c. 48, § 7.

THIS was a motion, in the nature of an appeal, on behalf of Mr. Barlow, a purchaser under the decree in the above cause, seeking to discharge an order of Vice-Chancellor STUART for a resale of the estate. The estate had been put up for sale by auction on the 24th of August, 1855, but the reserved bidding was not reached. It was then, by the direction of the Judge in Chambers, advertised for sale by tender. The advertisement contained the following notice:—

“Persons desirous of competing for the said estate are hereby informed that sealed tenders, addressed under cover to Robert William Peake, Esq., the chief clerk of Vice-Chancellor STUART (to whose Court the cause of *Osborne v. Foreman* is attached), and marked ‘private,’ will be received at his chambers, No. 11, Old Square, Lincoln’s Inn, London, up to and inclusive of Thursday, the 7th day of February, 1856, in the following form, and signed by the person or persons proposing to purchase the
 * 123 estate: ‘*Osborne v. Foreman*. — I (or we) * hereby agree to purchase the Birchden and Hamsell estate situate in the parishes of Rotherfield and Withyham, in the county of Kent, including the timber, underwood, and plantations thereon at the price or sum of—— pounds, subject to the conditions hereto annexed and subject to this contract receiving the sanction of the Vice-Chancellor to whose Court the cause of *Osborne v. Foreman* is attached. Dated the—— day of——, 1856. A. B. of——.’ Such tenders will be treated as confidential, and their contents will not be made public. Friday, the 8th day of February, at eleven o’clock in the forenoon, at the said chambers, is appointed by the said chief clerk for adjudicating on the said tenders.”

The advertisement went on to state that copies of the conditions of sale might be obtained.

One of the conditions was the following: “The chief clerk of the said Judge will proceed to certify the result on Friday, the 8th of February, 1856, at 11 o’clock in the forenoon, at which time the bidders may, if they think fit, attend by their solicitors at the chambers of the said Judge at No. 12 Old Square, Lincoln’s Inn, in the county of Middlesex, or in person. The certificate of sale, if any, will then be settled, and will in due course be signed and become binding without further notice or expense to the purchaser.

The person who is allowed to be the purchaser is to pay the sum of 2000*l.* by way of deposit into the name of the accountant-general of the Court, pursuant to an order to be obtained for that purpose by the vendors on or before the 18th day of February, 1856, and which said order is to be peremptory and shall be deemed to be duly served and delivered if left at the address of the said purchaser subscribed to his bidding.

* The appellant sent in a tender offering 36,500*l.*, and a * 124 Mr. Heffill, one of the respondents, sent in another tender offering 34,000*l.*

On the 8th of February, 1856, the chief clerk certified that Mr. Barlow was the purchaser.

On the 12th, a summons was obtained by Mr. Heffill to show cause why a resale should not take place, offering an advance of 1500*l.* The summons was served on the appellant on the 13th, on which day the certificate of the 8th was signed and approved by the Vice-Chancellor.

Mr. Heffill's summons was adjourned into Court, and the Vice-Chancellor, upon Mr. Heffill undertaking to replace some stock which Mr. Barlow had sold out to complete his purchase, by an order of the 19th of February, 1856, being the order under appeal, declared Mr. Heffill the purchaser at the advanced price.

Mr. W. M. James and *Mr. Baggallay*, for the appeal. — The practice of opening the biddings after a purchase at a sale by auction has not been yet extended to a sale by private contract like the present, which, by the conditions, became irrevocable when certified.

They referred to *Millican v. Vanderplank*, (a) 15 & 16 Vict. c. 80, § 34, and the 51st Order of the 16th of October, 1852.

Mr. Walker, *Mr. Bacon*, *Mr. Malins*, *Mr. Craig*, *Mr. C. M. Roupell*, *Mr. Fooks*, and *Mr. Batten*, for the respondents, were not called upon.

* THE LORD JUSTICE TURNER. — I wish to be understood as * 125 not differing from Vice-Chancellor WOOD in the observations

made by him in *Millican v. Vanderplank*. We entertain the same opinion as that learned Judge with regard to the duty of the Court to keep good faith with purchasers under decrees. This case, however, appears to me to depend on different considerations than those on which *Millican v. Vanderplank* was decided. The contract in the present case was a conditional one; it was an agreement on the part of the purchaser to purchase subject to the contract receiving the approbation of the Vice-Chancellor, and the third condition of sale explained the mode in which that sanction was to be obtained.

By the third condition it was stipulated that the certificate of sale would be settled on the 8th of February, and would in due course be signed and filed, and become binding without further notice; so that the certificate of purchase was to "become binding in due course." The Act of Parliament (15 & 16 Vict. c. 80) regulating the practice must be looked at to see what this meant; and by that Act, and the general order (49th) founded on it, four days are allowed for taking the opinion of the Judge in chambers, upon the certificate, and after the expiration of those four days, eight days more are, by the 51st Order, allowed for parties to come into Court to disturb the certificate. Here, though the certificate was signed by the Vice-Chancellor on the 13th of February, it was so after the summons had been taken out to supersede the contract. For the summons was taken out on the 12th and served on the 13th of February. But, whatever question there may be about that, the order of the Vice-Chancellor was made on the 19th of February, within twelve days of the date of the certificate,
 * 126 * and while it was still open to the Court to set it aside.

Unless, therefore, the condition that the certificate should in due course be signed and filed and become binding without further notice deprived the Court of the power to confirm or disaffirm it, the order of the Vice-Chancellor, made on the 19th of February, must be maintained, and I do not think that any such effect can be given to that condition.

THE LORD JUSTICE KNIGHT BRUCE. — I concur with regret. Mr. Barlow's costs of the appeal should be provided for.

Motion refused, and by arrangement the receiver to pay the costs out of moneys in his hands.

VORLEY v. RICHARDSON.

1856. March 4. Before the LORDS JUSTICES.

Personal estate was bequeathed upon trust to pay the income to the testator's wife till his youngest child attained twenty-one, she maintaining the children during their minorities, and then the capital was to be divided among the wife and children (by name), with benefit of survivorship: *Held*, that the survivorship referred to the period of distribution, and that a child did not, on attaining twenty-one, acquire an indefeasible interest.¹

Trustees ought to be parties to a special case to determine the construction of the instrument creating the trust.

THIS was a special case, transferred by order to their Lordships' paper from the Vice-Chancellor WOOD, to determine the construction of the following residuary gift: —

“I give and bequeath unto the said Thomas Oliver Beale and John Brown, their executors and administrators, all my personal estate and effects whatsoever, and wheresoever, upon trust that they the said Thomas Oliver * Beale and John Brown, or the sur- * 127
vivor of them, his executors and administrators, do and shall with all convenient speed after my decease convert the same into money, and after paying thereout the before-mentioned legacies, and my debts, funeral and testamentary expenses, do and shall lay out and invest the same at interest upon government or real securities, and from and out of the interest, dividends, and annual proceeds arising from the said trust moneys, do and shall pay thereout the sum of 20*l.* per annum to my father William Vorley and his assigns for the term of his natural life, and do and shall pay and apply the residue of the said interest, dividends, and annual proceeds unto or permit the same to be received by my said wife until my youngest child shall attain the age of twenty-one years, she thereout maintaining and educating all my children during their respective minorities; and in the event of my said wife dying or marrying again before my said youngest child shall attain the age of twenty-one years, then I direct my said trustees or the survivor of them, his executors or administrators, to pay and apply the said

¹ See *Neathway v. Reed*, 3 De G., M. & G. 18, n. (1), and cases cited.

dividends, interest, and annual proceeds, after payment thereof of the said annuity of 20*l.*, towards the maintenance and education of my said children until the youngest of them shall attain the age of twenty-one years; and when and so soon as that event shall happen, then do and shall pay, distribute, and divide all and singular the said trust premises, together with all arrears or accumulations of interest, if any, unto, between, or amongst my said wife and all and every my children, namely, Mary Ann Vorley, Maria Vorley, Eliza Vorley, Caroline Vorley, and Emma Vorley, in equal shares and proportions as tenants in common and not as joint tenants, with benefit of survivorship."

* 128 The testator left his wife and five children surviving, * of whom the youngest attained twenty-one in June, 1855. Of the others, two had previously died, one an infant and the other having attained twenty-one. The question was, whether the three survivors were entitled to the whole trust fund, or whether the administrator of the child who had attained twenty-one was entitled to participate.

Mr. Daniel and *Mr. Howe*, for the surviving children. — According to the well-settled rule of construction survivorship refers to the period of distribution. *Cripps v. Wolcott*, (a) *Neathway v. Reed*, (b) *Macdonald v. Bryce*, (c) *Re Pritchard's Trusts*, (d) *Gibbs v. Tait*. (e)

Mr. Elmsley and *Mr. Southgate*, for the administrator of the deceased adult child. — This case differs from those cited. In the first place, the gift is residuary, with respect to which the rule of construction is in favour of vesting absolutely at as early a period as possible. In the next place, there is no gift of interest during the interval between a child attaining twenty-one and the youngest attaining that age.

They referred to *Crozier v. Fisher*, (g) *Bouverie v. Bouverie*, (h) *Re Smith's Will*, (i) *Parker v. Sowerby*, (k) *Leeming v. Sherratt*. (l)

(a) 4 Madd. 11.

(b) 3 De G., M. & G. 18.

(c) 16 Beav. 581.

(d) 8 Drew. 163.

(e) 8 Sim. 132.

(g) 4 Russ. 398.

(h) 2 Ph. 349.

(i) 20 Beav. 197.

(k) 1 Drew. 488; 4 De G., M. & G. 321.

(l) 2 Hare, 14.

Mr. Daniel, in reply.

* THE LORD JUSTICE TURNER. — There can be no doubt * 129 that, if the words “with benefit of survivorship” had not been contained in the will, the testator’s wife and each of his children would have taken a vested interest in a share payable on the youngest child attaining twenty-one.¹ The question, therefore, is, what is the proper interpretation to be put upon these words? They are connected with the period of division, and *prima facie* must be taken to refer to that period, so as to show an intention that those children only should take who were living at that time.

The argument on the part of the defendant, to which the Court would have been glad to be able to accede, is, that the testator intended the survivorship to take place only on the death of any of the children under twenty-one, or being daughters, unmarried. Such a conclusion may, in some cases, be arrived at by force of an explanatory context, and in the cases cited for the defendant the context was such as to admit of that construction. In *Crozier v. Fisher* there was a gift of the income to the children before attaining twenty-one, which showed an intention, that if they attained twenty-one they were to take vested interests, and in *Bouverie v. Bouverie* there was a gift over if all the children died under the age of twenty-one, from which vested interests were implied. Here, the context does not aid such a construction; on the contrary, it rather tends the other way. The first trust of the income is to pay it to the wife until the youngest child attains the age of twenty-one years, she maintaining and educating all the children during their respective minorities. The next trust is that for the maintenance and education of the children after the death or marriage of the widow. This trust might include children who had attained twenty-one, but it could only * apply to living * 130 children, so that the representatives of a deceased child could not take any thing under it. Much as we are disposed, if we could, to give effect to the defendant’s argument, we cannot do so on the true construction of this will. The widow and the three surviving children must, therefore, take the whole, subject to the question, whether the share which Maria took in Eliza’s share went over by survivorship. If the plaintiffs insist that the accrued share survived, we will hear them upon it.

¹ See *Neathway v. Reed*, 3 De G., M. & G. 23, n. (1), and cases cited.

The Lord Justice KNIGHT BRUCE concurred.

Mr. Daniel, for the plaintiffs, did not press the point as to the subsequent accruer.

The Lord Justice TURNER, in the course of the argument, observed that the trustees were not made parties to the special case.

Mr. Elmsley submitted that it was not necessary to make them parties, and referred to *Darby v. Darby*. (a)

The Lord Justice TURNER said that it was clearly the intention of the Act (13 & 14 Vict. c. 35) that the trustees should be parties. Although the Court would, at the request of the parties, dispense with the presence of the trustees in the present instance, it must not be regarded as an authority on that point.

The Lord Justice KNIGHT BRUCE concurred, and said that the case must not be drawn into a precedent for trustees not being made parties.

1856. March 4. Before the LORDS JUSTICES.

Where a power to appoint among children was in default of any joint appointment by the husband and wife to be exercised by the survivor after the death of the other: *Held*, that a will made during their joint lives by the one who survived did not speak at his death, so as to be an execution of the power.¹

THIS was a special case, transferred to their Lordships' paper from that of Vice-Chancellor WOOD; and the question was, whether a will ought to be held as speaking at the death of the testator for the purpose of operating as the execution of a power

(a) 18 Beav. 412.

¹ The provision of the Wills Act, that the will is to be construed as if made immediately before the testator's death (see 1 Jarman Wills (3d Eng. ed.), 307 (4th Am. ed.), 305 [287] and notes), relates only to the property comprised in it. *Bullock v. Bennett*, 7 De G., M. & G. 283; *Cole v. Scott*, 3 Mac. & G. 518 and n. (2).

only exercisable after the decease of a co-donco of the power, who was alive at the time of the execution of the will.

The power was contained in a marriage settlement of July 21, 1827, whereby the trust fund was limited in trust for such of the children of the marriage as the husband and wife should jointly appoint, or in default of such appointment, then as the survivor at any time or times "after the decease of the other" should by deed or will appoint.

The husband had in 1847, during his wife's lifetime, made a will referring to the power, and appointing the fund in favour of some of the children. The wife died in 1848. There was no other attempt to exercise the power.

The husband married again, and his will was thereby revoked as to his own property given by it, but a question was raised as to whether it could be held to be an execution of the power as speaking at his death. An eminent conveyancer having advised that the point was not sufficiently clear to enable the trustees to act without the opinion of the Court, the present special case was settled to obtain that opinion, and their Lordships consented to hear it without the will being proved, on an undertaking * to * 132 prove it if it should be held to be a good exercise of the power.

Mr. Osborne and *Mr. Fane*, for different parties interested in default of appointment. — They referred to *MacAdam v. Logan*, (a) Sugden on Powers, (b) *Doe v. Tomkinson*, (c) *Hole v. Escott*, (d) *Stones v. Rowton*, (e) *Price v. Parker*, (g) *Fish v. Klein*, (h) *Coze v. Day*. (i)

Mr. Chapman Barber and *Mr. Selwyn*, for the several parties interested under the alleged appointment. — They contended that the will must speak as at the death of the testator, and therefore as if executed after the death of his wife, and also that it operated under the 24th section of the Wills Act as an execution of the power.

- (a) 3 Bro. C. C. 310.
- (b) Vol. 2, p. 119.
- (c) 2 Mau. & S. 165.
- (d) 4 Myl. & Cr. 187.

- (e) 17 Beav. 308.
- (g) 16 Sim. 198.
- (h) 2 Mer. 431.
- (i) 13 East, 118.

They referred to *Countess of Sutherland v. Northmore*, (a) *Dalby v. Pulken*, (b) *Stillman v. Weedon*. (c)

Mr. Piggott, for the trustees.

Mr. Osborne, in reply, was stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE. — I think that the words “ at any time after the decease of the other of them ” remove all doubt. The 24th section of the Wills Act has no application to the case. The appointment appears to me clearly invalid.

The Lord Justice TURNER concurred.

1856. February 25, 26. March 8. Before the LORDS JUSTICES.

A daughter executed a deed of gift of a life-estate to her father, soon after she attained twenty-one, having no advice except that of her father's solicitor, who, however, stated that he had on that occasion acted as the solicitor of the daughter, and had informed the father that he could take no instructions from him. She afterwards consulted a different solicitor as to the validity of the deed, and corresponded with her father on the subject of the application of the rents of the property. A year afterwards she married, and negotiations took place between her father and a solicitor, who acted for her intended husband and also for her, from which it appeared that she was aware of her father's interest under the deed of gift, and made no objection to it. She and her husband executed a post-nuptial settlement, which was expressed to be subject to the father's life-estate. She died more than ten years after the date of the deed of gift, and then her husband, to whom her rights devolved, filed a bill to set that deed aside: *Held*, 1st, that it might have been set aside but for subsequent acts of acquiescence; 2d, that there had been such acquiescence as to afford an effectual defence to the suit.¹

(a) 1 Dick. 56; 3 Vin. Abr. 427, pl. 8.

(c) 16 Sim. 26.

(b) 2 Bing. 144.

¹ See *Baker v. Bradley*, 7 De G., M. & G. 626 and citations in n. (1); *Stump v. Gaby*, 2 De G., M. & G. 623, n. (1); *Jarratt v. Aldam*, L. R. 9 Eq. 463; *Kerr, F. and M.* (1st Am. ed.) 298 *et seq.* The Court will not hold

Principles on which the Court acts in setting aside transactions between parent and child.¹

Where a father who was not of ability to maintain his daughter had, as her guardian, received the rents of her property, but had maintained her during her infancy and till her marriage, and had spent a considerable sum in the costs of a suit relating to her property, which ended beneficially for her, but of which her estate had to bear the costs: *Held*, that he was, in the circumstances of the case, entitled to retain the rents so received, by way of allowance for her education and his expenditure on her behalf.²

THIS was the appeal of the plaintiff from a decree of Vice-Chancellor Wood, reported in the second volume of Messrs. Kay & Johnson's Reports (a) dismissing the bill without costs. The appellant had been the husband of a deceased daughter of the respondent, and now sought in her right to set aside a deed of gift executed by her soon after she attained the age of twenty-one years.

The facts of the case appear sufficiently from the reports below and the judgments.

Mr. Rolt and Mr. Cole, for the appellant. — On the question of the original validity of the deed they referred to *Young v. Peachy*, (b) *Rock v. O'Brien*, (c) * *Dunbar v. Trenden-* * 134
nick, (d) *Bellamy v. Sabine*, (e) *Neesom v. Clarkson*, (g)
Phillipson v. Gatty, (h) *Archer v. Hudson*, (i) *Hoghton v. Hoghton*, (k) *Baker v. Bradley*. (l)

As to a voluntary deed being affirmed by a subsequent deed being expressed to be subject to it, *Honner v. Morton*. (m)

As to general acquiescence, *Duke of Leeds v. Earl of Am-*

the contract to be ratified where the delusion has been kept up. *Savery v. King*, 5 H. L. Cas. 627.

¹ See *Baker v. Bradley*, 7 De G., M. & G. 597, and references in notes (2) and (3); *Hatch v. Hatch*, 9 Ves. (Sumner's ed.) 292 and n. (c); *Savery v. King*, 5 H. L. Cas. 627.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1358, and n. (4), where this subject is considered and cases cited.

(a) Page 1.

(b) 2 Atk. 254.

(c) 1 Ball & B. 330.

(d) 2 Ball & B. 304.

(e) 2 Ph. 425.

(g) 2 Hare, 163.

(h) 7 Hare, 516.

(i) 7 Beav. 551.

(k) 15 Beav. 278.

(l) 7 De G., M. & G. 597.

(m) 3 Russ. 65.

herst, (a) Morse v. Royal, (b) Hatch v. Hatch, (c) Champion v. Rigby, (d) Walmesley v. Booth, (e) Murray v. Palmer, (g) Bennett v. Colley, (h) March v. Russell, (i) Alfrey v. Alfrey, (k) Wedderburn v. Wedderburn. (l)

As to taking an account of arrears of rents, *Dawson v. Massey. (m)*

Mr. Willcock and *Mr. R. Hawkins* were for the respondent. — They referred to *Roberts v. Tunstall. (n)*

Mr. Rolt, in reply.

Judgment reserved.

* 135 * THE LORD JUSTICE KNIGHT BRUCE. — This is a case which has been, and must be, decided mainly on its particular circumstances.

The suit, to which the parties are a son-in-law and his father-in-law, both midland county yeomen, was instituted in the year 1853, for the purpose of setting aside a gift made to the defendant by his daughter on the 8th of July, 1843, some few months after her majority, of an estate for his life, without impeachment of waste, in lands, which may be fairly represented as worth not more nor less than 180*l.* a year, and as having formed at the time the source of three-fifths of her income in possession. I say in possession, because she had then other property in reversion or remainder, which some years afterwards came into possession. She was the only child of his first marriage, and had lost her mother when not more than two or three years old. I say "his first marriage," but it appears to have been his only marriage until a time subsequent to his daughter's marriage with the plaintiff, if not subsequent to her death; so that the defendant had the merit, if that term may properly be used, of not having given her a stepmother. The bill also seeks an account of the daughter's rents received by

(a) 2 Ph. 117.

(b) 12 Ves. 355.

(c) 9 *Ib.* 292.

(d) 1 Russ. & Myl. 539.

(e) 2 Atk. 27.

(g) 2 Sch. & Lef. 474, 486.

(h) 2 Myl. & K. 225.

(i) 3 Myl. & Cr. 31.

(k) 10 Beav. 353; 1 Mac. & G. 87.

(l) 4 Myl. & Cr. 41.

(m) 1 Ball & Beat. 219.

(n) 4 Hare, 261.

the father during her minority, after her mother's death, and indeed until the daughter's marriage, which took place in 1844, when she was, I believe, in the twenty-third year of her age.

As the father-in-law has married again, so has the son-in-law, and but for these second unions, or one of them, it seems likely enough that this litigation would not have been brought into existence. The daughter, who died in the year 1850, left several children. The * father, at the commencement of the * 136 cause, was sixty-six years of age. There is issue of his second marriage.

After, but not before, the daughter's marriage, there was a settlement of the property, or part of it, made by the plaintiff and herself in March, 1845; and I am not clear that but for that settlement, the subsequent conduct of the plaintiff and his deceased wife during the residue of her life, and the fact of her death before the suit, — I am not clear that if his title against the defendant had stood on the same footing as it did immediately after the time of the plaintiff's first marriage, he would not have had a right to relief in this Court against the life-estate conferred on the defendant by the deed of the 8th of July, 1843, though the plaintiff before the marriage had express notice of it.

I say so, not on the ground that the gift, made as it was by a daughter to her father, ought to be considered as immoderate or irrational: for when his age of fifty-six years at the time, their respective circumstances at the time in point of property, and particularly the amount of the income in possession which she retained, as well as that with which she presented him for his life, and her interest in the Prior's Marston estate which was thereafter to devolve on her, and did in 1848 devolve on her in possession, are recollected, my opinion is, that the gift ought not to be deemed immoderate or irrational; nor on the ground that in the matter of the preparation or of the execution of the deed the solicitor who was employed failed professionally or otherwise in the performance of his duty to the young lady; for upon the evidence I think that he did not so fail: nor on the ground that she was led or induced to execute the deed by or through any suppression, any misrepresentation, or any kind of coercion, or of fraud or deceit; for upon the evidence I think that she * was not so; nor on * 137 the ground that when she executed the deed she was acting under any mistake or misapprehension, or was not competent to

understand well, or did not understand well, what she was doing, or did not intend the instrument to operate and have effect according to its actual purport and tenor; for upon the evidence my opinion is, that she was not then under any mistake or misapprehension, and did then well understand what she was doing, and did then intend the deed to operate and have effect according to its actual purport and tenor: nor on the ground that she executed it in ignorance of the value of what she gave, or in ignorance of what she kept, or in ignorance of any fact material to the guidance of her judgment in the matter; for upon the evidence my opinion is, that she did not: nor on the ground that the defendant acted dishonestly in the transaction; for upon the evidence I think that he did not: but upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice, and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expression, weighs in golden scales every transaction between a guardian and his ward, or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be — not, in the largest and amplest sense of the term; not, in mind as well as person — an entirely free agent.

In the present instance, however, having regard to the nature and state of the evidence, applicable as well to the time anterior as to the time subsequent to the daughter's marriage, I am satisfied that the acts and conduct of herself and the plaintiff * 138 between their marriage in 1844 * and her death in 1850, coupled as they are with the fact of that death happening before the suit, are sufficient to preclude him from such title, if any, to relief against the deed or any portion of it, as otherwise he would have had, the bill not having been filed before the year 1853.

Perhaps the settlement of March, 1845, is alone sufficient for this purpose, — not that I forget the departure from the terms of the draft of 1844; not that I forget the absence of any express confirmation or corroboration from the deed of 1845; not that I forget that the defendant was no party to it and had nothing to do with it; not that I am unaware that instances may well exist in which a person who has created an incumbrance on land, and

afterwards, in dealing with the property, has described it as "subject to the" incumbrance, may not be, therefore, less entitled, if otherwise entitled, in equity, to defeat the incumbrance, — such a state of things occurred, indeed, very lately, I believe, in the case of *Baker v. Bradley*, (a) — but because, in my opinion the plaintiff and his wife, by the settlement of March, 1845, intended to acknowledge themselves, and intended to treat and did treat and deal with the property comprised in the deed of July, 1843, as bound by the life-estate which it conferred on the defendant. In addition, however, to the settlement of March, 1845, there is, as I have said, the conduct of the plaintiff, and, with his concurrence (for so it must be taken), of his wife, during the residue of her life.

I am convinced that the whole conduct of the plaintiff and his wife, as long as she lived after her marriage, was intended by them and calculated to lead and did lead the defendant to believe that there was no wish or intention upon the part of the plaintiff or his wife to disturb, dispute, or question the defendant's life-interest under * the deed of July, 1843. I am of opinion * 139 that, during the whole of that period of five years and more, the plaintiff and his wife were well aware, not only of the true value of the property, but also of every material fact precedent to the marriage; that, moreover, during the whole of the same period of five years and more, the defendant with their knowledge and approbation considered himself as the owner for his life of the property in dispute, and so acted, and that, his daughter having died under that impression (an impression induced by no fraud or concealment, for upon the evidence there has, in my opinion, been no fraud or concealment on the defendant's part) — it would be not merely harsh, but erroneous also, upon a bill such as that before us, filed three years and more after her death, when of course her account of the business was no longer obtainable, to allow his life-interest to be disturbed by her husband; a conclusion, I repeat, to be taken in connection with what I have stated as my view of the evidence applicable to the manner and circumstances of the obtaining of the deed and its execution.

I ought, probably, to notice specifically the erroneous dealing or profession to deal with the Guilsborough lands in the deed of July,

1843, as qualifying some part of what I have said. That error I think wholly immaterial. In those lands neither the father nor the daughter had any interest. They were not intended to be affected by the instrument, which did not affect and could not have affected them, and they were mentioned among what lawyers call the "parcels" by a sheer, and, I repeat, an immaterial mistake.

There remains the question of the account of rents and profits, including occupation rent, I mean profits exclusive of timber and wood. For there is no proof that * any timber or wood was used, sold, or cut. The mother of the defendant's daughter died in December, 1824, when she was not quite three years old. Her grandmother Mrs. King died early in 1831, on which latter event the granddaughter became entitled in possession to a portion of her real estate, producing a gross rental not exceeding 180*l.* a year. But to another portion of it (this portion producing a gross rental not exceeding 120*l.* a year) she had become entitled in possession upon her mother's death, the rents and profits of which from that time, and the rents and profits of the other property from Mrs. King's death in 1831, the defendant received until his daughter's majority, and as to part until her marriage. But he educated and maintained her in a proper manner until her adult age, and afterwards maintained her in a proper manner until her marriage. He expended, also, a considerable sum, more, certainly, than 500*l.*, in the costs and expenses of proceedings in this Court mentioned in the bill, I mean the suit of *Vanderplank v. King*, which ended beneficially for her, but of which her rents were to bear the costs. He does not seem to have mismanaged the property or to have treated it otherwise than well; and it appears to me, considering his narrow circumstances during the whole time between his wife's death and his daughter's marriage, that it will not be in any sense acting too liberally in his favour to hold him entitled to retain all the rents and profits of her property that he received (for after the marriage he received or at least retained none) — to retain them by way of allowance for her education and maintenance and his expenditure on her behalf, including the costs and expenses of the suit of *Vanderplank v. King* — and more especially as between her marriage and the commencement of the present litigation there was a lapse of more than seven years. I am of opinion that this Court, if resort had been had to it during the minority,

would have * held the defendant to be, in the technical * 141 phrase, not of ability to maintain and educate his daughter properly from his own resources, and would have allowed to him, if not the whole, yet certainly not less than seven-eighths of her income for the time being from her mother's death to her majority for that purpose.

Finally, it appears to me that it was right to dismiss the bill, and that the appeal is groundless, although it may be right to enter on the record the defendant's undertaking to pay the amount, if any, which remains due in respect of any part of the costs or expenses of the suit of *Vanderplank v. King* that his daughter was or her rents were to bear, and the defendant consenting and my learned brother not objecting to this being done, let it be so.

I am not entirely persuaded that the bill ought to have been dismissed with costs, and therefore I am not for varying the Vice-Chancellor's order in this respect. It will stand as it is. But, with regard to the appeal, considering how the bill overlays the case, considering its charges of fraud, considering that it was not filed before the year 1853, considering the suit to be a stale and harsh proceeding acrimoniously prosecuted against the grandfather of some at least of the plaintiff's children, the appeal being dismissed ought, I think, to be dismissed with costs.

THE LORD JUSTICE TURNER. — The late wife of the plaintiff was the daughter and only child of this defendant. She was born in February, 1822. On the death of her mother in 1824 she became entitled to an estate at Boddington of the annual value of about 120*l*. On the death of her grandmother in * 1831 she * 142 became also entitled to an estate at Long Buckley of the annual value of about 155*l*.; but a question as to her title to the Long Buckley estate arose, and the suit of *Vanderplank v. King* was instituted in 1836, in which a decree was made in 1843 establishing her title, but directing the costs to be paid out of the rents and profits of the estate. She was also entitled to the reversion to an estate at Prior's Marston of the annual value of from 350*l*. to 450*l*., but there was a prior tenant for life of this estate, which did not fall into possession till 1848, when the tenant for life died.

The mother of the plaintiff's late wife was also entitled to an estate called Allerton of the annual value of about 60*l*., which was

subject to a prior life-estate in her grandmother. This estate was comprised in the defendant's marriage settlement, under which he was tenant for life, but he did not come into possession till 1831.. The defendant was possessed of a small estate called Tibbett's Farm, but that farm was subject to mortgages amounting to 4500*l.*, the interest of which was kept down by him and exceeded the rents: so that, until 1831, the defendant was not only without income, but was subject to the burden arising from the excess of the interest over the rents of Tibbett's Farm; he was a tenant farmer at a rack-rent. From the death of the mother the defendant received the rents of the Billesden property, and from the grandmother's death those of the Boddington and Buckley estates, on behalf of the daughter, the plaintiff's late wife. Out of the rents he maintained and educated his daughter, who appeared on the evidence to have been liberally, and probably expensively, maintained and educated. She had a riding-horse and a carriage, and was brought up well and in business-like habits.

* 143 * In February, 1843, she attained the age of twenty-one, and then it became necessary to determine what was to be done as to the receipt of the rents. Her father communicated with her, and here the transaction sought to be impeached by the bill had its commencement, in May, 1843. The account which the defendant gave as to the origin of these proposals (and it was the only account that could be had) was that he called the attention of his daughter to the state of the property and explained the whole subject to her, and that she then said that she thought he ought to have the rents of Boddington and Long Buckley during his life. He further stated that she saw Mr. Edwards, his solicitor, who told her that a disentailing deed was necessary. Mr. Edwards in his evidence said that, upon being consulted by the defendant on the matter, he informed the defendant that he could not take any instructions from him and must explain the whole matter to the daughter. He says that he called and saw the lady quite alone, that he asked her what she wished to do, and that she said she wished to give Boddington and Long Buckley to her father for his life. This having taken place in May, 1843, the father and daughter afterwards came up to town, and not long afterwards Mr. Edwards came to town bringing the deed with him, and it was executed at the house of the defendant's brother after

having been twice read over and explained to the daughter. It was executed on the 18th of July, 1843. It appeared that she was afterwards dissatisfied with what she had done and communicated on the subject with a Mrs. Hoare, saying that she thought the deed had been improperly obtained and that she should consult a solicitor. She then communicated with Mr. Tilson, who was connected with the family and was of the highest respectability. He appears to have given no decided opinion, but he wrote to Mr. Edwards for the deed. Mr. Edwards * com- * 144 municated with the defendant, who had an interview with Mr. Tilson. The result was that the defendant could not satisfy Mr. Tilson that he was right, nor Mr. Tilson satisfy him that he was wrong. There was then some communication with another connection of the family, and all ended in this, that the family was satisfied that the transaction had better not be disturbed. After this it appears that the father had observed a coolness on the part of his daughter towards him, and a communication in consequence of this took place between them. The daughter referred to information which she had received as to his application of the rents, the intimation being made that he was applying them to the support of a woman with whom he was living. The father, however, explained the matter to her, and she appears to have been satisfied, and they appear from that time to have been reconciled.

Then we come to the year 1844, when a treaty of marriage was entered into between the plaintiff Mr. Wright and the lady, and the subject of a settlement came under consideration. The defendant proposed that, in the event of failure of children of the marriage, he should have a life-estate on the Prior's Marston estate in priority to the life-estate of the husband. A correspondence took place between the father and daughter on the subject, and two of the letters which passed deserve particular attention, for in them the daughter proposed that her father should have a life-estate in some further property not comprised in the deed now impeached, but no life-estate in the Prior's Marston property. The father appears not to have adopted this proposal of the daughter. The draft of a settlement was prepared, and appears to have come under the consideration of Mr. Howes, an independent solicitor acting on behalf of the husband. Mr. Howes saw the lady on the subject, and she was * aware of her gift to her * 145 father and made no complaint about it. Eventually the

plaintiff and the lady married without any settlement being executed.

After the marriage, however, a settlement was executed bearing date the 25th of March, 1845, and by it the estates of Boddington and Long Buckley were conveyed to uses subject to the life-estate of the defendant. That settlement having been executed, the husband was applied to for the costs of his wife's outfit, which he very naturally declined to pay for. He remonstrated with the defendant, who ultimately paid the debt. The letter which the plaintiff wrote on this occasion is important, as showing that he knew his rights, for it contains this expression: "I have a claim against you, or my legal adviser is wholly mistaken;" an expression which affords strong evidence that he had full knowledge of his rights.

Nothing further material passed till the death of the wife in February, 1850, except that the defendant applied for a release as to the rents of the lady's property, which was not given. In May, 1850, a correspondence took place on the subject of partition, and the husband throughout this correspondence treated the defendant as tenant for life of the Boddington and Long Buckley estates. After this, in June, 1851, the plaintiff discovered that the defendant was going to marry again, and he himself afterwards married the sister of his present solicitor.

On these facts the Court is called upon to reverse the decision of the Vice-Chancellor, dismissing the bill without costs. I am of opinion that there is no ground for so doing. I have * 146 stated the facts rather minutely, not * from any doubt upon the case, but because all such questions as the present depend more on fact than law.

The law on the subject is well settled. A child may make a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a delib-

erate, unbiassed intention on the part of the child to give to the parent.

Applying these considerations to the present case, it is difficult to say that the transaction could have been maintained if the case had rested upon the mere circumstances which attended the original gift. I think that it could not. I am satisfied that the Court would be departing from established principles in upholding it. The transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter.

The transaction, therefore, was impeachable at and after its completion; and the only question is, whether it has become unimpeachable by reason of what has subsequently occurred. It has been argued at the bar that it has not; for that some positive act was required to make it so, and that here no such act has been done. I *am not of opinion that a positive act is *147 necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances. Here I have no doubt that there was a fixed, deliberate, and unbiassed determination on the part of the lady that the transaction should not be impeached. It is stated on the face of the bill that the daughter had been informed by some of her friends before her marriage that a fraud had been practised on her by the defendant. Now she was plainly a woman of strong understanding and capable of transacting business, and it is impossible to suppose that she, having been told that a fraud had been practised on her, should not have been aware that the Courts could relieve her. And if it were possible to suppose this, the facts of the case exclude the supposition. She said that she would consult a solicitor, and she did consult a solicitor, and though he gave her no advice on the subject, it was open to her to consult another solicitor. Having this information she took no proceedings to impeach the deed; but after a coolness with her father, arising from his supposed application of the rents, she, upon his explanation as to that point, became reconciled to him. Now it might be possible to get rid of this argument by saying that this forbearance was attributable to

parental influence. But suppose that to be so. What took place during the treaty for the marriage? The father proposed that he should have a life-interest in the Prior's Marston estate, the daughter refused, placed herself in the hands of her intended husband, and successfully resisted the proposal. It is impossible to suppose that parental influence was at work then; the *148 influence which * was then at work was that of the intended husband, and not that of the parent. It is clear that throughout the communications as to the settlement, the intended husband was the party whom she trusted, and in whom she placed her confidence. In one letter she makes a proposal to her father, prefaced with the statement that she had considered her relative duties as child and wife. A letter better weighed or considered, or one more clearly showing the writer to be a person of judgment, never came under my consideration. But if she desired, while not under parental influence, that her father should take a life-interest in some additional property, as she did by this letter, it is not possible to suppose that, while intending to give him this life-interest, she should at the same time have intended to revoke and recall that which she had already given. I think it clear that there was no such intention.

Then follows the post-nuptial settlement, by which the Boddington and Long Buckley estates were conveyed "subject to" the defendant's life-interest. Now these words are not without importance in a case like the present, although it is true that the effect of such an expression in a deed may depend on the circumstances under which that deed was executed. The case is distinguishable from that of *Honner v. Morton*. There a woman, having made a mortgage during coverture, made another mortgage subject to it after she became discover, and this was held to give no validity to the prior mortgage, for there the parties assumed the existence and validity of a former deed, and did not consider the question. But here a discussion had taken place of the rights and interests of the parties, and the question of the validity of the prior life-estate could not but have been before them.

*149 Nor would they have conveyed the *property in the unqualified terms of the deed if they had intended to impeach the life-estate. I think, therefore, that *Honner v. Morton* does not apply, and that effect must be given to the words "subject to the

life-estate." It is unnecessary, however, to lay any stress on this circumstance.

As to the time which has elapsed, if the case had rested on time only, much might have been said in favour of the plaintiff's claim. Having regard to the case of *Hatch v. Hatch*, I doubt whether, on the ground of lapse of time alone, relief could have been refused to the lady herself if she were alive. The case as to her would have been met by the proof of a continuance of the confidential relation up to the marriage, and of the disability of coverture since. In *Hatch v. Hatch* the husband was treated as a stranger, claiming under his wife; but the Court has now to deal with the claim of a husband, as against whom there is clear proof of acquiescence. For it is not to be doubted that he had full knowledge of all the circumstances, and yet he treated the defendant as tenant for life up to 1850, and in the negotiations and correspondence of that year. Lord ELDON's observations in *Hatch v. Hatch* are most guarded. He first deals with the subject as regards the wife, and then as regards the husband, who was a co-plaintiff. Lord ELDON said, "As to the other consideration, I am sorry to give the husband any relief, but I know of no instance, in cases of relief upon the policy of the law, where the objection, that a party not deserving the relief will get it, deriving through the other, has prevailed. Suppose she had died before marriage, and had devised to him, or he had become her heir. The transaction, if not good against her, is not good against him, for through her right it is that he gets any benefit." Lord ELDON * there was dealing with * 150 the case of death before marriage, and therefore with the case of a stranger claiming as a devisee or heir of the wife, and asks whether the fact of a stranger having prepared and attested the impeached deed would take away his right as heir or devisee. But that observation has no application to this case. Lord ELDON did not say that the acquiescence of the husband, as husband, would have no operation. If he so acquiesced, he must be bound like any one else.

The case of *Hatch v. Hatch* (a) had been much pressed on the Court as to the point of time, and at first sight it seems a very strong case. The bill there was filed in 1800 to impeach a transaction which took place in 1780; but if the case is examined, and

(a) 9 Ves. 292.

the ground of the decision is looked at, the difficulty vanishes, for Lord ELDON carefully guards himself upon the question of time by reference to the nature of the property, which was an advowson, and therefore produced no income. He says: "I do not deny that length of time is of great consequence in all these cases of fraud, breach of the policy of the law, &c. But in all cases it is some evidence that the transaction was understood at the time not to be fraudulent, and that there might have been some circumstances of the possibility of which the party ought to have the advantage." Then, afterwards, "Length of time also, with reference to the particular nature of this property, does not afford so considerable an objection as in some of the cases. The living was enjoyed by a title paramount this instrument during the life of Giles Hatch. This is very different from the case of stock, annuity, or estate, the income of which is received from time to time." Lord ELDON's words therefore show that his decision proceeded in a great * 151 degree on the nature of * the property, which was not capable of enjoyment from time to time.

But here the defendant was left in possession of the income. The parties knew of their right to impeach the gift, and left him to live on the income, and after ten years come to make him account. Looking at the lapse of time, and to the fixed, unbiassed, and deliberate intention of not impeaching the deed, which, in my opinion, must be attributed to the daughter, I think that the bill was rightly dismissed, so far as it seeks to impeach the grant to the father.

I think, also, that it was rightly dismissed as to the account of rents; for if the daughter did not intend to impeach her gift to her father, it cannot be supposed that she intended to make him account for the rents of her estate received by him during her minority. I shall not add any thing to the observations of my learned brother on this point.

I concur in dismissing the appeal with costs.

* HOLMES v. GODSON.

* 152

1856. March 1, 11. Before the LORDS JUSTICES.

A testator gave real and personal estate upon trust for his son, to vest in him on his attaining the age of twenty-one years, but if he should die under twenty-one, or having attained twenty-one should not have made a will, then the testator directed the property to be sold, and the proceeds to be held on other trusts: *Held*, that the property vested in the son absolutely at twenty-one, and that the gift over was repugnant and void.¹

THIS was a special case transferred from the paper of Vice-Chancellor WOOD, and heard originally by their Lordships.

The question was as to the effect of the will of the Reverend Thomas Yates Ridley, dated the 6th of November, 1837, and a codicil dated the 30th of December following. The material portion of the will was as follows: "I direct in the first place that all my just debts, my funeral and testamentary expenses and the expenses of proving this my will, be fully paid and satisfied. I give unto my dear wife Jane, to and for her own absolute use and benefit, all my plate, linen, household goods, furniture, wines, and other liquors, and all my farming-stock, carriages, carriage horses, and other horses of which I may be possessed at the time of my decease. I give and bequeath unto my dear wife Jane and Richard Godson, Esq., and the survivor of them, and the executors and administrators of such survivor, (a) upon trust, that they shall with all convenient speed call in and convert into money all such parts of my residuary estate as do not consist of money or security for money, upon trust for my son Thomas Yates Ridley, to vest in him on his attaining the age of twenty-one years; but in case my said son shall not live to attain a vested interest therein, then in trust for my dear wife Jane, during her natural life. I give and bequeath to my dear son Thomas Yates Ridley all my books,

(a) So in the copy of the will.

¹ See 2 Jarman Wills (3d Eng. ed.), 14-20, 1 *ib.* (4th Am. ed.) 692-697; 4 Kent (11th ed.), 131, 132; Gleason v. Fayerweather, 4 Gray, 348; Newkirk v. Newkirk, 2 Caines, 345; Brothers v. McCurdy, 36 Penn. St. 407; Walker v. Vincent, 19 Penn. St. 369; Blackstone Bank v. Davis, 21 Pick. 42; Hawley v. Northampton, 8 Mass. 3, 6; Bramhall v. Ferris, 4 Kernan (N. Y.), 44; Watkins v. Williams, 3 Mac. & G. 622, and cases in n. (1).

prints, and manuscripts, to and for his own absolute use for ever.

I give and bequeath unto my executors, my said dear wife * 153 Jane, and Richard * Godson, Esq., the advowson and all my living or rectory of Heysham, upon trust for the benefit of my dear son Thomas Yates Ridley, that they the said executors shall present to the rectory some person under bonds of resignation, to resign or vacate the living upon my son's arriving at the proper age for entering the church or holding the living, that person to be not under the age of sixty-five years. But in case my dear son Thomas Yates Ridley shall not live to attain the age of twenty-one years, or having attained the age of twenty-one years shall not have made a will, I hereby direct my said executors or trustees to sell all my property, both real and personal, at their discretion, and to invest the proceeds for the benefit of my said wife Jane, for her natural life; and after her death all the said investment I bequeath to my friend, Richard Godson, Esq. I hereby appoint my trustees and executors to be guardians of the person and estate of my son Thomas Yates Ridley. I hereby give the power to my executors and trustees to sell any portion of the real or personal property as may seem advisable to them, to enable them to advance such sums as they shall think fit to promote the education or advancement in the world of my said son, save and excepting my said advowson."

The only material part of the codicil was the following: "I devise all my property, real and personal (except the personal property therein devised), to my wife Jane and Richard Godson, their heirs and assigns, to carry into effect the trusts in my will created, and to sell my real property to pay my debts, or for the advancement of my son; and I also direct that the clergyman to be presented to the rectory, as in my will mentioned, may be under the age of sixty-five years, if my said wife Jane and Richard Godson think that it be better for the advantage of my son."

* 154 * The testator died on the 4th of February, 1838, and the will and codicil were proved by Jane Ridley and Richard Godson on the 7th of May, 1838.

Thomas Yates Ridley, the son, with the concurrence of the trustees, mortgaged the real estates comprised in the will: and by his marriage settlement, dated the 21st December, 1844, charged the property with a jointure rent-charge of 150*l.* for the benefit of his wife. By two indentures, dated respectively the

17th of April, 1854, and the 18th of July, 1854, he and his wife conveyed the estates to the plaintiffs, Arthur Holmes and Edward John Day, upon trust for sale and to apply the proceeds for the payment of his mortgage and other debts, and subject thereto upon certain trusts for the benefit of himself, his wife and children.

Thomas Yates Ridley, the son, died intestate on the 21st of February, 1855.

The questions for the consideration of the Court were :—

First, whether upon the construction of the will and codicil of the testator, Thomas Yates Ridley, the son, had upon his attaining the age of twenty-one years the power of alienating and disposing by deed of the real estates of the testator for an indefeasible estate of inheritance in fee-simple, subject only to the trusts declared thereof by the will and codicil for raising money for the purposes therein mentioned.

Secondly, whether the defendants, as claiming under Richard Godson or either of them, had any and what estate or interest in the hereditaments and premises devised * by the * 155 will and codicil and conveyed to the plaintiffs by the deeds.

Mr. W. M. James and *Mr. C. Hall*, for the plaintiff. — The gift to the son was absolute on his attaining twenty-one, and the devise over was repugnant and void. *Ex parte Palmer*, (a) *Ware v. Cann*, (b) *Bradley v. Peixoto*, (c) *Cuthbert v. Purrier*, (d) *Ross v. Ross*, (e) *Attorney-General v. Hall*, (g) *Green v. Harvey*, (h) *Byng v. Lord Strafford*, (i) *Watkins v. Williams*, (k) *In re Yalden*. (l)

Mr. W. Hislop Clarke, for Mrs. Godson. — The true effect of the gift to the son with the limitation over is, to give him an estate for life, with a power of appointment over, the fee to be executed by will, and the words “shall not have made a will” are equivalent to those used in the case of *Borton v. Borton*, (m) “subject to her disposition thereof.”

(a) 5 De G. & Sm. 649.

(b) 10 B. & C. 433.

(c) 3 Ves. 324.

(d) Jac. 415.

(e) 1 Jac. & W. 154.

(g) 1 Jac. & W. 158, n.

(h) 1 Hare, 428.

(i) 5 Beav. 558.

(k) 3 Mac. & G. 622.

(l) 1 De G., M. & G. 53.

(m) 16 Sim. 552.

The Lord Justice KNIGHT BRUCE referred to *Tomlinson v. Dighton*, (a) *Doe v. Thomas*. (b)

Mr. Swanston and *Mr. C. T. Simpson*, for another defendant. — *Doe v. Glover*, (c) establishes that the devise over is a good devise. *In re Yalden* (d) differs from the present case, as the property there was personal.

* 156 * They referred to *Beachcroft v. Broome*, (e) *Bull v. Kingston*, (g) *Constable v. Bull*. (h)

Mr. Lee (*amicus curiæ*) referred to *Lightburne v. Gill*, (i) and *Gulliver v. Vaux*. (k)

Mr. W. M. James, in reply.

Judgment reserved.

March 11.

THE LORD JUSTICE KNIGHT BRUCE. — In the will to be construed in this case, I think that the words “or having attained the age of twenty-one years shall not have made a will,” do not affect the interpretation of the instrument, and are of no force or efficacy. They are in my opinion repugnant to the absolute interest given by it to Thomas Yates Ridley the son, if he should live, as he did live to attain majority, and inconsistent with that absolute interest, and therefore in effect to be rejected or disregarded. Mr. Godson consequently, though he survived the testator’s widow, did not, as I conceive, acquire or take a beneficial interest of any kind under the will or codicil.

Many decided cases, not, I think, less than twelve, were cited at the bar during the argument, by way of authority for or against the plaintiff on this disputed point, some, if not all of them, apposite. The language of Mr. Justice COLERIDGE in *Doe v. Thomas*, (b) was, I believe, mentioned from the bench. The case of *Church-*

(a) 1 P. Wms. 149.

(b) 3 A. & E. 123.

(c) 1 C. B. 448.

(d) 1 De G., M. & G. 53.

(e) 4 T. R. 441.

(g) 1 Mer. 314.

(h) 3 De G. & Sm. 411.

(i) 6 Bro. P. C. 36.

(k) *Post*, p. 167.

ill v. Marks, (a) decided by myself, was not noticed nor * was probably material to be noticed, but the important * 157 authority of *Lightburne v. Gill*, (b) in the House of Lords, 1764, was brought under our attention by Mr. Lee, who informed us of a circumstance that I had forgotten; namely, that he had also communicated that authority to the Court during the argument of *Yalden's Case*, (c) decided by the present Lord Chancellor and myself. Here may properly be noticed also another considerable case, that of *Gulliver v. Vaux*, a manuscript report of which by Mr. Justice Burnett is among his manuscripts in Mr. Serjeant Hill's collection, and which my learned brother, I believe, intends particularly to mention.

On the whole the precedents are, in my judgment, amply sufficient to warrant us in arriving at the conclusion I have stated, if precedents were wanting for a determination so agreeable, according to my conception, to reason and principle.

It is of course impossible for me to forget the respect due to the decision of the Court of Common Pleas in Sir NICHOLAS TINDALL's time, mentioned, and very properly pressed on us, during the argument, nor am I unaware that if my present conclusion cannot be reconciled with that decision (which, however, it may perhaps be), I am dissenting (though I need not repeat, most respectfully dissenting) from an authority of much consideration and weight.

I do not see why the defendants here appeared separately. There should I think be no costs on either side.

* THE LORD JUSTICE TURNER. — The plaintiffs in this case * 158 claim to be entitled to certain real estates devised by the will of Thomas Yates Ridley under a conveyance from Thomas Yates Ridley, the son of the testator and a devisee under his will.

The testator by his will, after giving his wife his plate and so on, proceeded thus: "I give and bequeath unto my dear wife Jane, and Richard Godson, Esq., and the survivor of them, and the executors, administrators, and assigns of such survivor, upon trust that they shall with all convenient speed call and convert into money all such parts of my residuary estate as do not consist of money or security for money, upon trust for my son Thomas Yates Ridley to vest in him on his attaining the age of twenty-one

(a) 1 Coll. 441. (b) 6 Bro. P. C. 36. (c) 1 De G., M. & G. 53.

years ; but in case my said son shall not live to attain a vested interest therein, then in trust for my dear wife Jane during her natural life." Then there is a disposition of books, prints, and manuscripts in favour of the son. Then there is a bequest of the advowson at Heysham in trust for the benefit of the son. Then follows this clause : " But in case my dear son Thomas Yates Ridley shall not live to attain the age of twenty-one years, or having attained the age of twenty-one years shall not have made a will, I hereby direct my said executors or trustees to sell all my property both real and personal at their discretion, and to invest the proceeds for the benefit of my said wife Jane for her natural life, and after her death all the said investment I bequeath to my friend Richard Godson, Esq." There is a codicil to the will, by which the testator devises all his property, both real and personal, to his wife and Mr. Godson to carry into effect the trusts of his will created, and to sell his real property to pay his debts or for the advancement of his son.

* 159 * Now, upon the construction of this will and codicil, I think it reasonably clear that the real estates vested in the son at the age of twenty-one years, which he attained. The testator gives all such parts of his residuary estate as do not consist of money or securities for money. Whatever doubt there might have been upon those words if they had stood by themselves as to whether they would extend beyond a disposition of the personal estate only, that doubt is, I think, removed by the ulterior clause in the will, by which the testator has said, that in case his son shall not live to attain twenty-one, or having attained twenty-one shall not have made a will, he directs his executors and trustees to sell all his property both real and personal. It is, I think, quite plain that the testator in that clause meant to dispose, in the event of the son dying under twenty-one, of the property which the son was to take if he attained twenty-one, and that the disposition extends to all the testator's property both real and personal. I think, also, that the words of the will are sufficient to vest the fee in the son upon his attaining twenty-one.

The sole question, therefore, on the plaintiff's title is, whether the fee which was thus vested in the son was defeated and the estate carried over to the widow and Mr. Godson by the event which happened of the son having afterwards died without having made a will. I am of opinion that it was not.

This is in terms a disposition of real estate in favour of other devisees in the event of a devisee in fee dying intestate, and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this * disposition tends directly to contravene the * 160 law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad; and the cases which were cited in the argument appear to me to be conclusive upon the point.

In addition to those cases which were referred to, there is the case of *Lightburne v. Gill*, (a) to which my learned brother has referred, and which I have before me, where there was a sum of 500*l.* which the testator left to his daughter, to which he was entitled under a settlement, and all the rest of his worldly goods, effects, and substance real and personal to dispose of as she should think fit. But if his said daughter should die unmarried or intestate, then what was thereby left to her should go to and be equally divided among the children of his brother the Rev. Stafford Lightburne. The daughter having died intestate, the bill was filed in the Court of Chancery by the children of the brother, claiming to be entitled under the disposition over in the event of the daughter dying unmarried or intestate, and it was held that the bill could not be maintained. The bill was dismissed, there was an appeal to the House of Lords, and the House of Lords confirmed the decree dismissing the bill.

It was objected to these cases and to *Ross v. Ross*, (b) and others which I do not think it necessary to go through, and to this case of *Lightburne v. Gill*, that they all referred to personal estate. But, upon this question, I confess myself unable to see the distinction between cases relating to personal and cases relating to real estate. Such dispositions of personal estate are void because they are inconsistent with the absolute interest * and * 161 defeat the course of devolution which the law has provided. Upon what ground can it be held that the same principle does not reach to the like dispositions of real estate? I should feel great difficulty in maintaining such a distinction even if authority were wanting upon the point, but authority is not wanting upon it.

(a) 6 Bro. P. C. 36.

(b) 1 Jac. & W. 154.

I may refer to the case of *Muschamp v. Bluet* in Sir JOHN BRIDGMAN's Reports ; (a) although the case is not exactly in point in this case, yet I find some observations which are of great importance, as it strikes me, bearing upon the present question. There was this clause in the will : " And, as touching my lands at Tottenham, my son Matthew is joint purchaser with me of the most, and the rest of all my houses and land there which is freehold I give to Henry and Michael Lock upon this condition, that if they shall sell it to any man but to Matthew Lock my son, then he to enter upon it as of gift by this my will." The question arose first, whether the fee passed under the disposition to Henry and Michael. Cases are gone into on that subject affecting such dispositions by grant. Then the Court enters into the question of the effect of this in a devise, and says : " But I agree that in case of a devise, although the apt words to make an estate of inheritance to pass are omitted " (the devise was merely to Henry and Michael without any words of inheritance), " yet, if the intent of the devisor does appear by any express matter contained in the will, an estate of inheritance shall pass, for it is sufficient to pass the inheritance. If one deviseth land to another in perpetuance, the devise by these words shall pass an estate in fee. So, if one devise land to another to give, dispose, or sell at his pleasure, this is an estate in fee-simple." Then there follows this : " But

* 162 yet the law hath restrained *such intent. For, first, it ought to be agreeable to law and not repugnant to it ; for, although in *Scholastica's Case*, (b) in the comment, it is said that a will is like to an Act of Parliament, yet a will cannot alter the law or make a new form of an estate, which is not allowed by the rules of law, as an Act of Parliament is, and so adjudged in the Common Bench, Hil. T. 37 Eliz., between Jermin and Ascot, Coke's Reports, in *Corbet's Case*, (c) that by a devise a man cannot give an estate and determine part thereof by a condition and make the residue to continue. And if land be devised to one in tail he cannot determine the estate as to the devisee himself, and yet preserve the estate to the issue. And, 28 & 29 Hen. 8, Dyer, (d) if land be devised to one in fee, and if he does not perform such an act, the land shall remain to another, the remainder is void for no such remainder can be limited by the rules of law."

(a) J. Bridg. 132.

(c) 1 Rep. 85 a.

(b) Plowd. 403.

(d) Anon. Dyer, 33.

In another part of the same report there is a reference to *Baker's Case*, (a) in which it is said, "A devise to the husband and wife, with remainder to their two sons, upon condition that if they or their heirs go about to alien, &c., is a fee-simple: also for the heirs being restrained to alien, does show fully that the heir shall have the land, for otherwise he cannot alien it."

But there is another very much more important case, for which we are indebted also to the great research and knowledge which *Mr. Lee* has brought to our aid in the present case. I refer to the report in Serjeant Hill's manuscript, and which is really a most important case in my view of it as bearing on the present case. It is the case of *Gulliver v. Vaux*. (b) In that case Thomas *Turney was seised in fee and made his will on the * 163 29th of December, 1712, "and therein devised the premises to Thomas Turney his second son, and his heirs, provided he should live to attain the age of twenty-one years and not otherwise, and charged the estate with 850*l.* payable to the testator's daughter Dinah Turney at her age of twenty-four. And if his said son Thomas Turney, should die before twenty-one, then he devised the premises to his eldest son Tawyer Turney and his heirs when he should attain the age of twenty-one years, and charged the estate with 550*l.* payable to his daughter Dinah at her age of twenty-three. And if it should so happen that his son Thomas and his son Tawyer should both die before they should severally attain the age of twenty-one years, then he devised the premises to Dinah Turney and her heirs, and gives his wife the profits of the premises till her children should attain to their several ages above expressed, and after that gives her an annuity of 100*l.* a year for life issuing out of the estate. Then follows this clause: "And for prevention of any difference which may hereafter arise concerning the inheritance of my real estate, in case it shall so happen that all my three children shall depart this life without leaving issue lawfully begotten and born of any of their bodies and without appointing the disposal of the same, then and in such case I give to Ann my wife 500*l.* yearly over and above the 100*l.* already mentioned, payable out of my said estate. Also I give 10*l.* yearly to the ministers and churchwardens of Cransfield to be disposed in charitable uses. Also I give all my said lands unto my loving cousins Robert Perrott, Richard Perrott, Thomas Dell, and Robert

(a) Cited J. Bridg. 137.

(b) See *post*, p. 167.

Dell." The sons and the daughter all died under twenty-one, and all died without making any disposition of the estate and in the terms of this will without appointing the disposal of the same.

The devisees, however, brought ejectment, and upon that

* 164 two questions appear to have arisen: first, whether according to the true construction of the will the sons and the daughter took estates tail or estates in fee; and secondly, supposing they did take estates in fee, then, whether the executory devise over in the event of their all dying without leaving issue lawfully begotten and without appointing the disposal of the same was a good executory devise. All the Judges, Lord Chief Justice WILLES, Mr. Justice ABNEY, and Mr. Justice BURNETT, agreed in opinion it was a fee in favour of the son; and then came the question, whether the executory devise over was good. Lord Chief Justice WILLES and Mr. Justice ABNEY delivered their opinions that the executory devise was good upon this ground, that it fell within the period allowed by law. That was the opinion which they gave in the first instance. Mr. Justice BURNETT, however, agreeing that the sons and the daughter would take in fee and that the case was one of executory devise, and agreeing also that the executory devise would take effect within a limited period, addressed himself to this question, what was the effect of the clause in the will by which the executory devise was made to depend upon the sons and the daughter dying without appointing the disposal of the estate? and he expressed himself thus: "But I am clearly of opinion that this condition or contingency" (it is very important, perhaps, to observe those words) "annexed to the estate of the children and precedent to that of the devisees' estate is a void condition, and consequently the devise dependent on it can never take place. A condition or contingency repugnant to the estate devised must be void. Thus, a devise to one in fee upon condition that he shall not alien is void. So a devise in fee, upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, is void, because repugnant to the estate devised. So feoffment in fee, upon condition that feoffee's daughters shall not inherit, is void, because repugnant to the

* 165 nature of the estate.¹ What is the condition here? That if Thomas dies without issue, his heirs shall not take by descent but by appointment; whereas a devise to a man's heir-at-

¹ See references in note (1), *ante*, 152.

law, or grant to heirs, is void and he will take by descent. In this case, therefore, a devise in fee upon the condition that his heirs shall not take by descent unless he specially appoints them is a void condition, and consequently the devise subsisting on that condition is void." Then the case concluded thus: Lord Chief Justice WILLES and Mr. Justice ABNEY both changed their opinion and concurred with Mr. Justice BURNETT in the opinion he expressed. There cannot be a higher authority than that case, either as applicable to the present or with reference to the weight which it derives from the Judges by whom it was decided.

These cases of *Muschamp v. Bluet*, (a) *Gulliver v. Vaux*, (b) *Ware v. Cann*, (c) referred to, are all cases of real estate, and they seem to me clearly to prove that, upon this point there is no distinction between the cases relating to real and personal estate. In truth, the decisions in both cases turn, as I apprehend, on this: the law has said, that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void.

In the argument of this case, great reliance was placed, on the part of the defendants, on the case of *Doe v. Glover*; (d) but in that case the Court seems to me to have proceeded upon the ground, that the devise over was not repugnant to or inconsistent with the prior devise, * and the Court, therefore, *166 certainly did not intend to disturb the previous authorities on the principle on which they proceeded. The devise was there a devise in fee, and in case the devisee should not have parted with or disposed of the same, then over. The Court was of opinion that he could not, under that, dispose of it by will, but that the testator meant, unless there was a parting with or disposition of the estate by deed in the lifetime of the first devisee, the devisees over would take, and the executory devise over to them would be good. I may observe, too, that the attention of the Court seems hardly to have been drawn to the point, that the devise over, as it was construed, took away the testamentary power which was incident to the fee first devised. Not one word seems to have fallen from the Court or from counsel in the course of the argu-

(a) J. Bridg. 132.

(c) 10 B. & C. 493.

(b) Post, p. 167.

(d) 1 C. B. 448.

ment as to the effect of that decision being to contravene the rule of law by which every devisee in fee has a testamentary power. But it is plain, on looking at the cases, that if a man says the estate shall go over if you do not dispose of it by deed; he says, you shall not have that power which the law gives of disposition by will. That point seems not to have been drawn to the attention of the Court, and, I will venture to add that, if that case of *Doe v. Glover* is to be considered as conflicting with the other authorities, I think that the other authorities, and especially the case of *Gulliver v. Vaux*, ought to prevail against it.

Another case was referred to, *Borton v. Borton*, (a) where the disposition was to the daughter, to be made subject to her disposition, and then there followed a power to her to dispose of the property by will. But that case proceeded entirely on the particular words of the will. The Vice-Chancellor of England * 167 evidently considered * the words "to be subject to her disposition thereof," as meaning to be subject to her testamentary disposition and as referring to the ulterior power of testamentary disposition given to her. The case, therefore, depends entirely upon the particular language of the will, and without saying whether it is consistent or inconsistent with the case of *Doe v. Thomas*, (b) and the principle to which Mr. Justice COLERIDGE referred in *Doe v. Thomas*, it is not material to the present case.

My opinion therefore is, that the answer to this case must be in favour of the plaintiffs.

GULLIVER, on the Demise of Robert Dell and Richard Perrot, v. MARGARET VAUX.

In Ejectment on Case reserved at Nisi Prius.

1746. Easter Term.

A testator devised real estate to his second son in fee if he attained twenty-one, charged with a legacy to a daughter, and if the second son died under twenty-one, then to the eldest son when he attained twenty-one, charged with the legacy; and in case it should happen that all the testator's three children should die without issue, and without appointing the disposal of the estate, then over: *Held*, that the devise over was repugnant and void.

(a) 16 Sim. 552.

(b) 3 A. & E. 123.

THOMAS TURNEY, seised in fee of the premises, 29th December, 1712, made his will and therein devised the premises to Thomas Turney (his second son) and his heirs, provided he should live to attain the age of twenty-one years, and not otherwise; and charged this estate with 350*l.*, payable to the testator's daughter Dinah Turney at the age of twenty-four. And if his said son Thomas Turney should die before twenty-one, then he devised the premises to his (eldest) son Tawyer Turney and his heirs, when he should attain the age of twenty-one years; and charges this estate with 350*l.*, payable to his daughter Dinah at her age of twenty-three. And if it should so happen that his son Thomas and his son Tawyer should both die before they should severally attain the age of twenty-one years, then he devised the premises to his daughter Dinah Turney and her heirs; and gives his wife the profits of the premises till her children should attain to their several ages above expressed, and after that gives her an annuity of 100*l.* a year for life, issuing out of the estate. "And for prevention of any difference which may hereafter arise concerning the inheritance of my real estate, in case it shall so happen that all my three children shall depart this life without leaving issue lawfully begotten and born of any of their bodies, and without appointing the disposal of the same, then and in such case I give to Ann, my wife 500*l.* yearly over and above the 100*l.* already mentioned, payable out of my said estate. Also I give 10*l.* yearly to the ministers and * church-wardens of Cransfield to be dis- * 168 posed in charitable uses. Also I give all my said lands unto my loving cousins Robert Perrot, Richard Perrot, Thomas Dell, and Robert Dell, their heirs and assigns for ever."

The testator died in February, 1712, leaving three children alive and under age, Tawyer Turney, Thomas Turney, and Dinah Turney. And the testator's wife entered and held the estate till her son Thomas Turney attained his age of twenty-one years, at which age he entered and held the estate till the time of his death in July, 1740. Upon whose death Tawyer Turney entered and held the estate till his death in November, 1740. Dinah died unmarried, some few years after the testator's death, and in the lifetime of her brothers. And Thomas and Tawyer both died without issue, having made no will or other disposition of the estate. And the testator's widow died in November, 1740. Margaret Vaux, next cousin and heir-at-law to Tawyer Turney, upon his death entered upon the estate. Upon whom the two lessors of the plaintiff, who are the only surviving devisees, entered.

The question (reserved at the trial of this ejectment at Buckingham before Mr. J. ABNEY) was, whether the lessors of the plaintiff had any title by this devise to the lands in question?

Skinner, Serjt., and *Draper*, Serjt., at another day, for lessors of plaintiff. — If this is good by way of remainder or by way of executory devise, then a good title is in the lessors of plaintiff.

1. It has been more than once laid down, and not now to be disputed, that subsequent words will control the largeness of the preceding and abridge the estate. Thus an estate to A. and her heirs, and if they die without issue, to B., is an estate tail in A. *Clarke's Case*, Dyer, 390; 1 R. A. 892; P. pl. 6;

Sk. 8; Bulstr. 194; *Altham's Case*, 8 Co. 154. In this case, had the testator said only, and if my three children die without leaving issue, this had plainly made it an estate tail in the children, what then will the other words operate, not having appointed the disposal, *utile per inutile non vitiatur*. These words shall be rejected as inconsistent, or so explained as to be consistent with the main scope of the will. Thus he might mean by these words, not having disposed thereof by fine or recovery as tenants in tail may by law do. Whereas construing it as a general disposal will defeat the testator's manifest intent that his devisees over should take before any heirs of his children, not being heirs of the body.

2. But supposing these words are taken in, then this will be a good
 * 169 *executory devise to the lessors of the plaintiff, being only within the compass of three lives, that the contingency must happen. For it must be understood, "and if my three children die without issue living at the time of their death, not having appointed the disposal of the estate, then to the devisees." So that this event must happen at the death of the survivor of the three children, and is within the rule: *Masseyburgh v. Ashe*, 1 Sid. 450, 451; 1 Vern. 234; 1 R. A. 612; 2 Vern. 758, 766; 1 Peer. Wms. 605; and the words "not having appointed the disposal" may be construed to enure as a power to dispose by deed or will.

Prime, Serjt., and *Willes*, Serjt., at another day, for the defendant.—The single question is, whether this devise over be good, as a remainder or as an executory devise.

1. As a remainder it cannot, because it is a remainder after a fee, unless the subsequent words abridge the estate. For the estate to the two brothers is plainly a fee for three reasons: First. Because it is expressly given to them and their heirs, and Tawyer takes the fee if Thomas does not live to twenty-one, though Thomas leaves issue. Secondly. It is a fee because charged with the payment of money generally. Co. Lit. 9b. Thirdly. Because in the last clause he considers them as having the disposal of the estate, which is itself a gift of a fee. *Tomlinson v. Dighton*, 1 R. A. 834, pl. 7; 1 Salk. 240. So that in the abridging clause, where he considers them as having the fee, the words, if they die without issue not having appointed the disposal, are not words that can abridge the estate, but denote an event, on which the estate is intended to go over. For it is plain the testator as much meant that his children might dispose of the estate, though they had no issue, as he did that the devisees over should take if his children died without issue not having disposed of the estate, and all the cases cited are where the word "heirs" are explained by subsequent words to signify heirs of the body, and no other words to show the testator meant a fee to the first devisee; so in *Clache's Case*, Dyer, 330, which is denied to be law in 2 Jon. 172. But if it were, it is where the words, if she die without issue, are accompanied with no words of restraint. So in the case of *Pell v. Brown*, if Thomas died without issue living, William is an executory devisee, and not an estate tail, and stronger than that is *Spaulding v. Spaulding*, Cro. Car. 185.

2. Supposing this to be an executory devise it is too remote, for it is upon

a dying without issue not having appointed the disposal, consequently is likewise inconsistent with the first devise; *Bolton's Case*, Palm. 132; Cro. Jac. 117. For upon his attaining twenty-one he has a fee, and yet on dying without issue, not appointing the disposal, * that fee is given away; and * 170 though there may be contingency upon contingencies, yet no case where an estate is vested upon one contingency and is to be divested by another. *Snow v. Culler*, 1 Lev. 135; S. C., Raym. 162.

L. C. J. WILLIAMS. — 1. The devise under consideration cannot be good as a remainder, for the first estate being executory all the rest are so. *Reeve v. Long*, Carth. 309, 310. Now it is plain the estate to Thomas is executory on his coming to twenty-one, and whether he has issue or not Tawyer takes upon Thomas dying before twenty-one. If he lives to twenty-one, Tawyer and Dinah can never take by that will, therefore if the devisees over take it must be by way of executory devise.

2. It should seem this may be good by way of executory devise; for the candles are lighted at once, and the event must happen at the death of the survivor of the three children. And by the opinion of KELING, C. J., and TWYSDEN in *Snow v. Culler*, 1 Lev. 135, several contingencies, one upon another, are good if they are to happen in a reasonable time. *Scattergood v. Edge*, 1 Salk. 229. The time was held in the compass of twenty or thirty years, or of a life or lives then in being. That by the case of *Gore v. Gore*, 2 Peer. Williams, 28, the Judges have gone as far as twenty-one beyond a life in being, but in this case the contingency must happen at the end of a life in being; viz., the survivor of the children.

ABNEY, J., concurred in opinion with the Chief Justice, that this devise over was good by way of executory devise. *Massenburgh v. Ash*, 1 Vern. 234, carries the reasonable time to twenty-one years beyond a life in being, and then several contingencies may be limited one on the other, if they must take place within that time. Thus a term for years in trust, which is construed in equity as a will, assigned to trustees in trust for husband and wife during their lives and the life of the survivor of them, and after their deaths in trust to be assigned to the first son at his age of twenty-one, if he die before that age to the second son at his age of twenty-one, and so on to the several sons, and if the husband and wife die without issue, or the issue all die before they attain the age of twenty-one, then in trust to assign the term to Sir William Massenburgh. This was held by the opinion of this Court to be a good limitation of a term by way of executory devise, for the contingency must happen within twenty-one years after the death of husband and wife.

BURNETT, J., said: 1. This could not be good by way of remainder, for the first estate was a fee on which no remainder could depend; for the dying without issue, if not coupled with other words, would * certainly abridge * 171 the first devise, yet dying without issue living William, was held not to abridge the first devise to Thomas, in the case of *Pell v. Brown*, Cro. Jac. 599; Palm. 132, and as to this point there was a very similar case in chancery,

Miller and Others v. Moor, 13 Geo. 2, 1740. The plaintiffs brought their bill for a legacy devised to them by the will of Susannah Selwyn, charged on her lands; the defendant Moor in his answer set forth, that these lands were the estate of William Selwyn, who being seised in fee and having three daughters, Susannah, Mary (defendant Moor's wife), and Ann, devised them as follows: "I give my lands to my three daughters, their heirs and assigns, immediately after the death of my wife, and if it shall please God that all my three daughters shall happen to die and leaving no issue of their bodies to inherit such estate, and not being of age or make no other disposal thereof, then my lands shall be the sole and proper estate of my kinsman Samuel Birch." Ann died in her father's life, Susannah made her will, and bequeathed her lands to her sister Mary, charged with a legacy to the plaintiff. The defendant Moor insisted that the estate in the daughter was an estate tail in their respective shares with cross remainders, and therefore Susannah had no power to demise or charge the estate by devise. This matter was referred to the Court of King's Bench, who were unanimously of opinion that the daughter took an estate in fee, and not an estate tail by this devise. (How far the devise over was good or not, was not a question in that case, though it would have been a case in point upon the present will.)

2. In the next place, I differ from Lord Chief Justice and my brother ABBEY, and am of opinion, that even by way of executory devise, the devise over in this case must be void. I readily agree that it is not out of the reasonable compass of time, and I confess the authority of all the cases, where it is holden that many contingencies may be limited one upon the other, provided they must happen in a reasonable time. But I should rather choose to express that as *KELING*, L. C. J., and *TWYSDEN*, C. J., do, in the case of *Snow v. Outler*, reported 1 Lev. 135; Raym. 162, but more at large and more historically in 1 Keb. 567, 752, 800; 2 Keb. 11, 145, 296, by saying that a condition is good though it consist of several contingencies, if all of them amount to one condition, and contingencies of this nature may be limited one upon another in favour of different persons; but I know no case where it is held, that when an estate is made to vest in fee in one person by a contingency, that the same estate after vested upon the contingency has been held well limited upon another contingency that shall divest it; however, I do not give my express opinion that such an executory devise would be bad. That this is such a case is plain; for upon Thomas's attaining twenty-one, his estate in fee vested in him upon * 172 his and his brother Tawyer and sister * Dinah's dying without issue, not having disposed of the estate, the estate was divested out of him and went to the devisees.

But I am clearly of opinion that this condition or contingency annexed to the estate of the children, and precedent to that of the devisee's estate, is a void condition, and consequently the devise dependent on it can never take place. A condition or contingency repugnant to the estate devised must be void; thus a devise to one in fee, upon condition that he shall not alien, is void. Co. Litt. 223. So a devise in fee, upon condition that the wife shall not be endowed or the husband be tenant by the curtesy, is void, because repugnant to the estate devised. *Mary Portington's Case*, 10 Co. 88; *Sir Anthony Mildmay's Case*, 6

Co. 41 a. So feoffment in fee, upon condition that the feoffee's daughters shall not inherit, is void, because repugnant to the nature of the estate.

What is the condition here? That if Thomas dies without issue his heirs shall not take by descent but by appointment, whereas a devise to a man's heir-at-law, or grant to heirs, is void, and he will take by descent. *Counden v. Clarke*, Hob. 30.

In this case, therefore, a devise in fee, upon the condition that his heirs shall not take by descent, unless he specially appoint them, is a void condition, and consequently the devise subsisting on that condition is void.

Afterwards, upon conference between us, WILLES, L. C. J., and ARNEY, J., changed their opinions, and WILLES, L. C. J., delivered the resolution of the Court agreeable to my opinion.

Extracted from Mr. Justice BURNETT'S MSS., vol. 10, pp. 282-295, in Serjt. Hill's collection of MSS., Lincoln's Inn Library.

* In The Matter of WALTON'S ESTATE and of the 9 & * 173
10 Vict. c. 34.

1856. March 14. Before the LORDS JUSTICES.

Under a devise of real estate in trust for the testator's widow for her life, and at her death to sell the property and divide the proceeds among the testator's five children by name, "or their heirs or assigns:" *Held*, that the children took absolutely on the death of the testator.¹

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY, upon the construction of a will. The question arose under a petition for payment out of Court of a portion of a sum paid in by the commissioners of woods and forests, for the purchase of land taken by them under the powers of the above Act of Parliament, being an Act for enabling the commissioners to construct a new street from Spitalfields to Shoreditch.

The will was that of William Walton, dated the 4th of September, 1837, and was, so far as material, as follows:—

"I give and bequeath unto Phoebe Beck Walton, William Walton, Robert Walter Smith, and Thomas Bryden all my disposable

¹ See 1 Jarman Wills (3d Eng. ed.), 482, 483.

freehold property, together with all my personal estate of what kind soever it may consist, in trust that they my said trustees or executors or last survivor of them shall and do receive all rents, interests, and dividends, as they may severally accrue due, and pay and apply the same unto the use of my beloved wife Phoebe Beck Walton, and that after her decease the same shall be sold and the proceeds equally divided between my dear children, William Walton, Sussanah Smith (wife of Robert Walter Smith of Myddelton Square), Francis Walton, Phoebe Walton, and John Eldridge Walton, or their heirs or assigns."

The will concluded with the following clause: "And as * 174 in my present weak state I cannot more explicitly * divide my property, should any misunderstanding arise as to the true meaning and intent of this my last will, I recommend my dear children to settle the same by arbitration."

Phoebe Walton survived the testator, and having intermarried with John Hammond White, died on the 7th July, 1854, in the lifetime of the testator's widow, leaving two children, Laura Phoebe White and Arthur Moreland White. Her husband was her administrator. Phoebe Beck Walton, the testator's widow, died in 1855.

The Vice-Chancellor KINDERSLEY decided that the administrator of Phoebe White was not entitled to her share, but that it belonged either as real estate to her son as her heir-at-law or to her two children as her next of kin, and by the order under appeal this share was directed to be carried to the account of the two children, without prejudice to the question whether they were entitled thereto in equal shares as her next of kin, or whether the son took the whole as her heir.

The administrator of Phoebe White appealed.

Mr. Giffard and *Mr. Baggallay*, for the appellant. — In *Wright v. Wright*, (a) where a testator devised lands to his son or his son's heirs in the event of a daughter dying unmarried, it was held that "or" must be read "and." So in *Read v. Snell*, (b) where there was a residuary gift of realty and personalty in trust to be settled on the testator's daughter or the heirs of her body,

(a) 1 Ves. Sen. 409.

(b) 2 Atk. 645.

the gift was held to be absolute, the word "or" being construed "and." There are many other authorities to the same effect,¹ two of the most recent being * *Parkin v. Knight* (a) * 175 and *Harris v. Davis*. (b) This is a much stronger case, for the use of the word "assigns" shows that the word "or" cannot be meant to operate substitutionally.

Mr. Sheffield, for the respondents. — The construction contended for on behalf of the appellant renders the words "or their heirs or assigns" inoperative, and is therefore one not to be adopted if any other can be found; the rule being so to construe an instrument as, if possible to give some effect to every word of it. Such a construction can be given here by construing the words as the Vice-Chancellor has done. In *Gittings v. Macdermott*, (c) Lord BROUGHAM said: "The force of the disjunctive word 'or' is not easily to be got over. Had it been 'and,' the words of limitation would of course, as applied to a chattel interest, have been surplusage, but the disjunctive marks as plainly as possible that the testator by using it intended to provide for an alternative bequest;" and this was followed in *Doody v. Higgins*, (d) where there was, as in this case, a prior estate for life given by the will.

He also referred to *Waite v. Templer*. (e)

Mr. Giffard, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I regret being obliged to come to a conclusion favourable to the appellant. It appears to me that the words "or their heirs or assigns," are superfluous and inoperative. I agree that the general leaning of the Court is to construe an instrument so as to give some effect to * all its words. There are, however, cases to which that * 176 rule does not apply, and this, in my judgment, is one of them. I think that the words in question are only added for the purpose of indicating, however unnecessarily, that the children were to take absolutely.

(a) 15 Sim. 83.

(d) 9 Hare, App. 32.

(b) 1 Coll. 416.

(e) 2 Sim. 524.

(c) 2 Myl. & K. 69.

¹ See *Pearson v. Butter*, 3 De G., M. & G. 398, n. (1), and cases cited.

THE LORD JUSTICE TURNER. — If this had been simply a gift to the children “or their heirs,” I should not have thought it right to decide it without a careful consideration of the authorities, for it appears to me that there is a material difference with reference to such a question as this, between a gift of realty to a devisee “or his heirs,” and a gift in the same terms of part of the proceeds of sale of a real estate in the shape of money. Here, however, the gift is to the devisee or his heirs or assigns, and if the word “or” is to be read alternately in one part of the expression it must be read so in the other. Now a gift to A. or the assigns of A. imports, that A. is to take absolutely, and I think that a gift to A. or his heirs or assigns must have the same effect. Moreover, in this will the testator has put his own interpretation upon the expressions which he had used. For in the last clause of the will he recommends his children to settle by arbitration any misunderstanding that may arise as to the construction of his will. This assumes that the children would, under the will, have power to settle disputes, and does not appear to contemplate any more remote class of persons having an interest. But apart from this explanatory clause, I think that the true construction of the words themselves is, that the children were intended to take absolutely. The husband is, therefore, entitled to his wife’s share, as her administrator.

Ordered accordingly, the costs to be paid out of the one-fifth share.

*177 *In the Matter of The AMAZON LIFE ASSURANCE
AND LOAN COMPANY, and of The JOINT-STOCK
COMPANIES WINDING-UP ACTS, 1848 & 1849.

BLACKBURN’S CASE.

1856. February 19. March 13. Before the LORDS JUSTICES.

The projectors of an intended joint-stock company issued a prospectus headed “The Amazon Life Assurance and Loan Company and Sick Benefit Society,” and stating the intention of the projectors to form a loan and assurance company with a branch sick benefit society. The company was registered as

“The Amazon Life Assurance and Loan Company.” After this registration an application headed in the same way as the prospectus was made for shares, and an answer was returned headed with the registered title, and stating that shares in the company so registered had been allotted to the applicant. The applicant paid the deposits on the shares and received certificates headed with the registered title, but did not acknowledge the receipt of them or interfere any further. On the company being wound up: *Held*, that the allottee was not entitled to have his name removed from the list of contributories, on the ground that he had applied for shares in a different company, or on the ground that he had been informed that he would only incur a limited liability.

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY, reported in the 3d volume of Mr. Drewry's Reports, (a) confirming the decision of the Master, by which the name of the respondent Mr. Amos Blackburn had been removed from the list of contributories of the Amazon Life Assurance and Loan Company. The official manager having been satisfied with the Master's decision, the motion to restore the name was made by the appellant Mr. Hutchinson, whose name had been already settled upon the list of contributories.

Before the provisional registration of the company prospectuses were issued by the projectors, headed with the following title, “Amazon Life Assurance and Loan Company and Sick Benefit Society,” and stating the intention of the projectors to form an assurance and loan company, with a branch sick benefit society.

* Some time afterwards, on the 26th of April, 1853, * 178 an association was provisionally registered for the assurance and loan department under the title of the Amazon Life Assurance and Loan Society, and was completely registered under that title on the 12th of August, 1853.

On the 18th of October, 1853, Mr. Blackburn sent the following application for shares: —

“To the Directors of the Amazon Life Assurance and Loan Company and Sick Benefit Society.

“I request you to allot me fifty shares in the above undertaking, and I agree to accept such shares or any less number that may be

allotted to me, and to pay the deposit thereon and to execute the deed of settlement when required.

" Dated this 18th day of October, 1853.

" AMOS BLACKBURN."

The following answer was sent to him : —

" The Amazon Life Assurance and Loan Company.

" Capital, 100,000*l.* in shares of 1*l.* each.

" Deposit 5*s.* per share, to be paid on allotment.

" Head office, &c.,

" London, 20th October, 1853.

" No. 564. Shares, 50. 12*l.* 10*s.*

" SIR, — I am directed to inform you that in compliance with your letter of application the directors have allotted to you fifty shares in this company, and you are requested to pay the sum of 12*l.* 10*s.* within ten days from the date hereof at this office, when a receipt shall be given, which will be exchanged for share certificates with as little delay as possible.

" R. G. WEAR, *Manager.*"

* 179 * On his not replying to this letter another was sent him with the same heading, requesting payment of the deposit, and he thereupon paid the deposit of 12*l.* 10*s.* on the fifty shares.

The share certificates were sent to and received by Mr. Blackburn, and were in the following form : —

" Amazon Life Assurance and Loan Company.

" Capital 100,000*l.*; 100,000 shares of 1*l.* each.

" First completely registered on the 19th of August, 1853, pursuant to 7 & 8 Vict. c. 110.

" Nos. 35,928 to 35,977 both inclusive.

" This is to certify that Amos Blackburn, of Underbank Stansfield, Todmorden, Yorkshire, independent minister, is the proprietor of fifty shares, Nos. 35,928 to 35,977 inclusive, of the Amazon Assurance and Loan Company, subject to the regulations of the company, and that to this day there has been paid up the sum of 5*s.* on each of such shares. Given, &c."

In October, 1854, the winding-up order was made, and Mr. Blackburn was placed by the official manager on the list of contributories as having taken the fifty shares and paid the deposits on them. He claimed before the Master to be struck off the list on the ground that he had applied for fifty shares in the "Amazon Life Assurance and Loan Company, and Sick Benefit Society," and that the shares had been allotted to him in the "Amazon Life Assurance and Loan Company," and on the further ground that he had applied for the shares on a representation that he would only incur a limited liability.

The Master having removed the name, the present appellant moved by way of appeal before the Vice-Chancellor and afterwards before their Lordships that Mr. Blackburn's name might be restored to the list.

* After the appeal had been partly heard it was ordered * 180 to stand over for the production of additional evidence, and on such evidence being adduced it was again argued on this day. The general effect of the evidence appears sufficiently from the judgment of Lord Justice TURNER.

Mr. Malins and Mr. Cairns, for the appellant.

Mr. Roxburgh, for the official manager.

Mr. Swanston and Mr. Selwyn, for Mr. Blackburn.

The following cases were referred to: *Parbury's Case*, (a) *Sharpus's Case*, (b) *Lord Mansfield's Case*, (c) *Yelland's Case*. (d)

Mr. Cairns, in reply.

THE LORD JUSTICE TURNER.—On the facts appearing in evidence there can be no doubt that Mr. Blackburn made an application for shares; that a certificate of the shares was forwarded to him, and that he retained it. *Prima facie*, therefore, he has made himself liable as a contributory.

Two points, however, were urged in his behalf; first, that he

(a) 3 De G. & Sm. 43.

(c) 3 De G. & Sm. 58.

(b) 3 De G. & Sm. 49.

(d) 5 De G. & Sm. 395.

was informed that he would only incur a limited liability. This is entirely a question of law. He must be considered to have known that such a limited liability was not possible, and I am of opinion that such a defence cannot be entertained.

It is then said that there had been an alteration in the
 * 181 * constitution of the company, that it was advertised as a life assurance, loan, and sick benefit society, but that it was registered as a life assurance and loan company only. One answer to this is, that the letter sent to Mr. Blackburn in reply to his application for shares was headed "Amazon Life Assurance and Loan Company," and that the same heading was on the certificate and the application for payment of the deposit, and that it is clear, therefore, that the change was known to Mr. Blackburn before he accepted the shares.

Another answer is that, in truth, no change was made in the constitution of the company to affect the interests of Mr. Blackburn. In the prospectus the sick benefit society is treated as a separate branch of the loan benefit society. And now it appears that there was a sick benefit department belonging to the society. I am of opinion that there was no ground for Mr. Blackburn's application to be removed from the list, and that his name must be restored to it.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

* 182 * WADEER v. THE EAST INDIA COMPANY.

1856. March 13, 14. Before the LORDS JUSTICES.

Documents belonging to the East India Company relating to its political duties, held to be protected from production.¹

Semble, that documents not within the rules protecting them from production by reason of their own contents, will not be protected by their connection or association with protected documents.

THIS was an appeal of the defendants the East India Company from the decision of the Master of the Rolls, directing the produc-

¹ See 1 Dan. Ch. Fr. (4th Am. ed.) 581.

tion by the defendants of certain documents mentioned in a schedule to their answer. The plaintiff was the deposed Rajah of Coorg, and sought by his bill the delivery to him of certain promissory notes of the Governor-General of India, dated in 1811 and 1832.

The answer admitted the possession by the defendants of documents relating to the matters in the bill mentioned; but with respect to the documents mentioned in the second schedule to the answer it stated as follows: "And we say that the second of such schedules contains exclusively divers political communications in our possession or power, which, in the fulfilment of our public political duty and that of our several governments in India, have passed between us and our said governments respectively, solely with a view to the good government of India and for the purpose of enabling us to perform our public duty in that behalf, none of which communications, however, passed or were had with a view to this suit or the defence of the same. And we say that the third of such schedules contains exclusively documents which are in the possession of our several governments in India, none of which, however, can be dealt with or disposed of by us in any other manner than by a despatch approved by the board of commissioners for the affairs of India, who are not parties to this suit."

* The bill having been amended, the defendants by their * 188 answer to the amended bill stated as follows: "We say, with reference to the documents mentioned in the second schedule to our former answer, that although, as will appear by reference to the said second schedule, several of the documents therein mentioned were not directly communications between us and our several governments in India, yet that such last-mentioned documents came into our possession with and as part of the political communications which, in fulfilment of our public political duty, and that of our said several governments in India, have passed between us and our said governments respectively solely with a view to the good government of India as mentioned in our said former answer with reference to the said second schedule. And we further say that we have in the schedule hereto annexed set forth a list of certain of the letters and other documents mentioned in the second and fourth schedules to our former answer; and we say that the several letters mentioned in the schedule hereto

consist exclusively of political communications which passed exclusively between divers official agents of our said several governments in India in fulfilment and execution of their public political duty and for the purposes of the public government of India, none of which communications, however, passed, or were had with a view to this suit, and that the extract political consultations and minutes, and extracts of minutes, resolutions, and memorandums mentioned in the schedule hereto are all documents which were made by official persons in fulfilment and execution of their public political duty and for the purposes of their public government of India, and none of them were so made with reference to this suit. And we say, that with a view to the good government of India it has always been part of the system of the government of India to require the most full and unreserved

* 184 * communications in writing between us and our said several governments in India, and between the various political agents and officers of our said several governments in India, as to all public affairs, and also to require minutes to be made of the proceedings and consultations of the persons having the conduct of our several governments in India, and that the effective maintenance of such a system is essential to the good government of India, and that the public interest would be greatly prejudiced if letters and other documents written in the execution of such public duty, or the contents of the same, were liable to be produced or disclosed at the instance of private individuals; and we say that all the communications which passed between us and our several governments in India, as mentioned in the second schedule to our former answer and in this answer, and also the documents mentioned in the schedule hereto, were made and written in the execution of such public duty as aforesaid."

Mr. Wigram, Mr. Lloyd, and Mr. Melville, for the appellants. — They referred to Wyatt v. Gore, (a) Murray v. Walter, (b) Hame v. Bentinck, (c) Rex v. Watson, (d) Cooke v. Maxwell, (e) Black v. Smith, (g) Smith v. East India Company, (h) Blake v. Pil-

(a) Holt, N. P. 299.

(b) Cr. & Ph. 114.

(c) 2 Bro. & B. 180.

(d) 2 Stark. 135.

(e) *Ibid.* 183.

(g) Fox & Smith, Irish K. B. 84.

(h) 1 Ph. 50.

fold, (a) Glyn v. Caulfield, (b) 53 Geo. 3, c. 155, § 68; 3 & 4, Will. 4, c. 85, §§ 25, 39, 56.

* *Mr. R. Palmer and Mr. A. J. Lewis*, for the plaintiff. * 185

Mr. Wigram, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The position of the East India Company with reference to the British Crown on one hand, and the territory, the inhabitants and the local governments of India on the other, the rights also and powers of the British Crown with reference to that territory, those inhabitants, those local governments and the East India Company, are too well known and too universally understood to render explanations and comments otherwise than superfluous. We may therefore proceed at once upon the assumption that all considerations belonging to that subject are universally and well apprehended.

There are certain propositions which at the present stage of the cause may, I think, with propriety be assumed without deciding them. For every purpose of the present motion, but without prejudice to any question that may be raised at the hearing of the cause, I assume that this Court has jurisdiction in the cause over the East India Company; that is to say, has jurisdiction if the plaintiff's case shall be proved, and the facts as proved shall appear to show an equitable title to a decree against the East India Company, which decree itself would be enforced in a manner analogous to that in which other decrees are carried into execution. As I have said, however, I only assume that for the purpose of the present appeal. I assume also that the plaintiff's case does not stand the worse for the absence of the Attorney-General and the board of control from the present record. The argument is plausible, and perhaps * well founded (though I * 186 intimate no opinion upon it), that the order asked upon the present application, if otherwise proper, could not be rightly made in the absence of the Attorney-General and the board of control. I repeat, however, that, for every present purpose I take it for granted that the plaintiff's case ought not, with reference to this application, to suffer from that circumstance. On the other hand,

it is of course plain that the plaintiff cannot fairly or reasonably ask to have the case treated as if the Attorney-General or the board of control were present and not opposing; that is of course entirely out of the question.

We then come to the question whether, as to the documents which are sought to be protected from inspection — and from the right (be it added) of making abstracts, extracts, and copies, which accompanies the right of inspection — the East India Company, standing in the known position in which they stand, and to which I have as far as it can be possibly necessary referred, can be compelled to produce documents, whatever information material to the plaintiff's case they may be supposed to contain, which are thus described: First, as to the second schedule to the original answer, "we say that the second of such schedules contains exclusively divers political communications in our possession, which in fulfilment of our public political duty and that of our several governments in India, have passed between us and our said governments respectively, and solely with a view to the good government of India and for the purpose of enabling us to perform our public duty in that behalf, none of which communications, however, passed or were had with a view to this suit or the defence of the same." No reference to any authority, no precedent, is

wanted for coming to a conclusion upon a statement of
 *187 *this description. The first principles of jurisprudence and every consideration due to the public interests combine to render it impossible, as it appears to me, for a Court of justice to interfere for the purpose of compelling the production of documents accurately so described.

If any documents not of the description here applied to the documents scheduled are amongst them, those of course would be liable to a different consideration. *Primâ facie* every document thus described in the answer must be taken to be as it is described. If to demonstration it can be shown on the face of the answers and the schedules themselves that there are among them documents which cannot be of this description, they of course will be excepted. The burden lies upon the plaintiff to show that from the contents of this record.

[His Lordship then read the description of the documents in the schedule to the second answer of the defendants, and proceeded as follows:] The observations made with reference to the

passage which I read from the first answer are all applicable also to this; and I repeat that, in my judgment, it is clear that the principles upon which justice is administered in civil Courts, whether between the sovereign and a subject or between subject and subject, preclude the possibility of the interference of the Court for the purpose of the disclosure of state papers, despatches, minutes, or documents of any such description which relate to the carrying on of the government, and are connected with the transaction of public affairs. It lies, therefore, upon the plaintiff, as I have said, to show to demonstration that some of the documents described by the words which I have read do not fall within that description. If he can do so, I certainly * am ready * 188 to concur in an order (to which, indeed, the defendants do not seem to object) for their production in this suit, of course without prejudice to any defence which may be made at the hearing of the cause.

THE LORD JUSTICE TURNER. — The East India Company, the defendants upon this record, have two capacities, one a private capacity as a trading company, and another a public capacity as exercising sovereign power, subject, as I understand the case, to the sovereignty of this country. In their public capacity they hold the government of India on behalf of the Crown of England. This bill relates to matters affecting the company in their private or trading capacity, but, it reaches also to matters which affect the company in their public capacity as a sovereign power, for I find in the bill a charge of this description: "The following are the circumstances which led to and terminated in the hostile invasion of the plaintiff's country by the defendants." It then states a variety of circumstances which led to the invasion of the territory of the plaintiff, and concludes thus: "The plaintiff's non-compliance with the requisition to release one of the officers of the company who seems to have been accredited to his government, was construed by the defendants' agents in India as a defiance of their paramount authority, and they forthwith collected a large force and marched into the plaintiff's country, and after defeating (as they easily did) the feeble opposition they met with from the plaintiff's troops, they took possession of the plaintiff's country, deprived him of all his property, and consigned him to a prison. The plaintiff submits that the circumstances above detailed did

not justify an appeal to arms on the part of the defendants,
 * 189 and that the * invasion and forcible occupation of the plaintiff's *raj*, and the plaintiff's expulsion therefrom, were not the consequences of a just war, but acts of spoliation and rapine, and did not and could not confer the rights of conquest as alleged and pretended by the defendants."

Now these are matters which relate to the proceedings of the company. The company, it is said, have in their possession certain documents which relate to the matters in question in the cause, those matters in question being both private and public. My learned brother has already read, and therefore I do not read again the passages contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say, that they are stated in the answers, on which the plaintiff is moving for a production, to be political communications, which, in fulfilment of the public political duties of the East India Company and of their several governments in India, have passed between them and their governments respectively, solely with a view to the good government of India and to the performance of a public duty. The question which has been suggested in the argument as to contracts between the East India Company and any railway subscribers with reference to the formation of a railway has nothing to do with a question relating to the public government of India and the performance of the public duty of the company. To such a question it is unnecessary to refer, because it is perfectly distinguishable from that before the Court.

In the course of the argument a number of cases have been cited upon the subject of the obligation to produce documents of this description, and minute distinctions have been at-
 * 190 tempted to be drawn upon the part of the * plaintiff, as to the extent to which those cases have gone. I think, however, that it is perfectly obvious on reading those cases, that they have proceeded upon a broad general principle of public policy. I cannot give my assent to the proposition, that they proceeded at all upon the ground that the parties who were called upon to produce the documents were not parties to the suit, or not parties who were sued in respect of the matters which were in question. I think that they rest upon a higher and much more important principle.

If we order the production of the documents in the present case,

we must follow out that by ordering the production of documents in every case of a similar description where a civil right may exist against the East India Company. There may be pending political transactions between the company and the various sovereigns in India, and questions of private right may arise between the sovereigns of those dominions and the company, or between the company and the subjects of those dominions. A bill may be filed in this Court with reference to these transactions, and if the order which has been made by the Master of the Rolls in this case can be maintained, all the official communications which have passed between the company, and their agents, and their governments in India, might be produced upon such a bill, and this Court would be made the medium of the production of documents which may be of the utmost importance upon the question of peace or war, and upon the question of whether a war which has been instituted by the government of India has been a just or an unjust war. Now nothing could be more prejudicial to the public interests than such a course as that, and I am quite satisfied that the cases which have been decided have proceeded upon the principle of the danger to the public interests which * would * 191 result from the production of such documents in cases of this description.

I am satisfied that there is, in this Court at least, a further principle applying to cases of this description; namely, that, with matters of political relations between state and state, this Court has nothing whatever to do. They are matters which are excepted from municipal jurisdiction, and when, therefore, this Court is called upon to order the production of documents relating to such matters, it is in truth called upon to order the production of documents relating to matters which in their nature are not subject to the jurisdiction of the Court. I think that principle as applicable to this case as the other. But the more important and more general principle is, the ground of public policy, and of the prejudice to the interests of the public which would arise by the production of such documents.

There are, perhaps, some of the documents contained in the schedules to these answers as to which the production may be properly enforced without prejudice to any public interests, and I should desire to add to what my learned brother has said upon that subject, that I am not prepared at present to go the length to

which *Mr. Wigram* has carried his argument, that documents, which are not of themselves of a character to justify the Court in refusing the production of them are to be withheld upon the ground that they are connected with other documents, or rather associated with other documents, the production of which the company may be entitled to withhold. I am not prepared at present to go that length, and therefore, if the production of those documents is insisted upon, we will hear what is to be said upon that subject. I rather apprehend at present that the right

* 192 to protection depends upon the character of * the documents themselves, and not upon their association with others.

[The further point was not argued, an arrangement having been come to for the production, on affidavit, of such of the documents as did not relate to the political duties of the company.]

CROFTS v. MIDDLETON.

1856. February 27, 28. March 19. Before the LORDS JUSTICES.

A testator devised land to his daughter for life, with remainder to her children in fee, but if there should not be any such child, or if all such children should die under twenty-one and without issue, then to the heirs and assigns of the daughter. The daughter and her husband by deed acknowledged, according to 8 & 4 Will. 4. c. 74, in consideration of her husband having made large expenditure in improving the property, conveyed it to the use of the daughter for life, with remainder to the use of her children in fee, and in the event of there being no such child, to such uses as the husband should appoint, and subject thereto to the use of the husband in fee: *Held*, that, under the provisions of the Act, the conveyance was effectual in equity, if not at law also, to pass the wife's ultimate interest under the will, although that interest should be held to have been a contingent remainder,¹ as to which *quære*.

Where there is an equitable title in a defendant to an action of ejectment, the Court will at his suit restrain the proceedings in the action, although there may be a question whether he would not be successful at law.²

THIS was an appeal from the decision of Vice-Chancellor Wood, dismissing a bill for foreclosure. The title of the plaintiff and

¹ See *Sugden V. & P.* (14th Eng. ed.) 206-208, 472, 473, 715.

² See *Kerr Inj.* 25.

his mortgagor, one of the defendants, was derived under the will of Benjamin Middleton, who was seised in fee of the mortgaged property, and by his will after giving to his wife Sarah Middleton during her natural life the use and enjoyment of all his household goods and furniture, and the rents, interests, and dividends of all his real and personal estates, and property, whatsoever and where-soever, gave and devised after her decease to his son Samuel Middleton, and to his heirs and assigns for ever, certain *hereditaments, which the testator specified, subject to * 193 certain charges. He then gave to his daughter Eliza Chapman, and her assigns, during her life for her sole and separate use, certain hereditaments, which he particularly described. The will then proceeded as follows: "And after the decease of my said daughter Eliza Chapman, I do hereby give and devise the said two dwelling-houses with the appurtenances thereof unto an only child, or all and every the children of her my said daughter, Eliza Chapman, lawfully to be begotten (if more than one), in equal shares or proportions as tenants in common and not as joint-tenants, and the heirs and assigns of such child or children respectively for ever. But in case any one or more of such children shall die under the age of twenty-one years, and without leaving lawful issue of his, her, or their body, or respective bodies, living at the death of him or them respectively, and so often as such event may happen, the share or shares as well accruing as original of every such child so dying shall be and remain to the survivor or survivors, or other or others, of the said children in equal shares or proportions, if more than one to take as tenants in common, and his, her, or their heirs and assigns respectively for ever, every share which shall so accrue to any such child being liable to the same condition of survivorship or accruer as his or her original share. And in case there shall not be any child of my said daughter Eliza Chapman, or if any and all such children shall die under the age of twenty-one years, and without leaving lawful issue as aforesaid, then I do hereby give and devise the said two dwelling-houses, with the appurtenances thereof, unto the heirs and assigns of my said daughter Eliza Chapman for ever." The will then proceeded to dispose of other hereditaments in favour of the testator's daughter Martha Fidler and her children, and then of other hereditaments in favour of his son * John * 194 Middleton and John Middleton's children. Then came the

devise in question, which was as follows: " And I give and devise unto my daughter Sophia Middleton, spinster, and her assigns, during her natural life for her sole and separate use, all those two dwelling-houses adjoining the Coopers' Arms, in Bartholomew Street, in Newbury aforesaid, now occupied by me and my tenant Sarah Long, with the yard behind the same, and other the appurtenances thereof; and after the decease of my said daughter Sophia Middleton, I do hereby give and devise the said two dwelling-houses and premises, with the appurtenances thereof, unto an only child or all and every the children of her my said daughter Sophia Middleton, lawfully to be begotten (if more than one), in equal shares or proportions, as tenants in common and not as joint-tenants, and the heirs, and assigns of such child or children respectively for ever, with the like benefit and condition of survivorship and accruer as is hereinbefore given or provided with respect to the children of my said daughter Eliza Chapman; and in case there shall not be any child of my said daughter Sophia Middleton, or if any and all such children shall die under the age of twenty-one years and without leaving lawful issue as aforesaid, then I do hereby give and devise the said two dwelling-houses and premises, with the appurtenances thereof, unto the heirs and assigns of my said daughter Sophia Middleton for ever. All the rest and residue of my real and personal estates, effects and property, whatsoever and wheresoever, I give, devise, and bequeath the same unto my said son Samuel, and my said daughters Eliza, Martha, and Sophia, their heirs, executors, administrators, and assigns respectively for ever, as tenants in common, not as joint-tenants;" and the testator directed that the share of each daughter should be for her separate use.

*195 *The testator's daughter Sophia Middleton married the defendant John Beale between the making of the will and the testator's death, which happened before the year 1840. His widow died in the year 1846, but between the two deaths the defendant John Beale and his wife, in the year 1840, executed indentures of lease and release, of which each, or the indenture of release, was duly acknowledged by Mrs. Beale in the manner directed by the Statute 3 & 4 Will. 4, c. 74, as to the deeds of married women. The indenture of release was expressed to be made between John Beale and Sophia his wife of the one part, and James Beale of the other part. It recited the will and death of Benjamin Middleton, and the

marriage of Sophia with John Beale. It further recited that the defendant John Beale and Sophia his wife had, with the consent of Sarah Middleton, widow of the testator Benjamin Middleton, caused the two dwelling-houses so devised by him to his daughter Sophia as aforesaid to be pulled down, and in the room thereof had begun to erect a messuage or tenement with offices and other buildings, and that they were therefore desirous of settling and assuring the same and other the hereditaments and premises so devised to her the said Sophia, and adjoining and belonging thereto, to the uses thereafter mentioned. It then witnessed, that for effectuating the intention of the parties, and in consideration of ten shillings, John Beale and Sophia his wife granted, aliened, and released to James Beale and his heirs and assigns the hereditaments (describing them), to hold unto James Beale, his heirs and assigns, to uses thus expressed: "To the use of Sarah Middleton" (who had not joined in the conveyance) "the widow of Benjamin Middleton and her assigns during the term of her natural life, and from and immediately after her decease to the use of the said Sophia, the wife of John Beale, and her assigns during her life, without impeachment * of waste, and from and immediately * 196 after her decease to the use of an only child, or all and every the children of the said Sophia Beale lawfully to be begotten (if more than one), in equal shares and proportions, as tenants in common and not as joint tenants, and of the heirs and assigns of such child or children respectively for ever. Provided always, that if any one or more of such children shall die under the age of twenty-one years and without leaving lawful issue of his, her, or their body or respective bodies living at the death of him, her, or them respectively, and so often as such event shall happen, the share or shares, as well accruing as original, of every such child so dying shall remain to the use of the survivor or survivors or other or others of the said children, in equal shares or proportions, if more than one, to take as tenants in common, and of his, her, or their heirs and assigns respectively for ever, and that every share which shall so accrue to any such child shall be liable to the same condition of survivorship or accruer as his, her, or their original shares, and if there shall not be any child of the said Sophia Beale, or if any or all such children shall die under the age of twenty-one years and without leaving lawful issue as aforesaid, then to the use of such person or persons, for such estate or estates, interest or

interests, upon such trusts, for such intents and purposes, and with, under, and subject to such charges, powers, provisions, and conditions and declarations, and in such manner or form, as said John Beale by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered in the presence of two or more credible witnesses, shall at any time or from time to time direct, limit, or appoint, and in default of and until such direction, limitation, or appointment and so far as any

such direction, limitation, or appointment, if incomplete,
 * 197 shall not extend, to the use of the said * John Beale and his assigns during his life, without impeachment of waste, and from and after the determination of that estate by any means, to the use of the said James Beale and his heirs, during the life of the said John Beale, in trust for him the said John Beale and his assigns; and from and immediately after the determination of the estate so limited in use to the said James Beale and his heirs during the life of the said John Beale, to the use of the said John Beale, his heirs and assigns for ever."

Afterwards, in 1842, the defendant John Beale borrowed 500*l.* of Richard Harrison, and as a security for its repayment executed an indenture of mortgage dated 23d April, 1842, and made between Sarah Middleton (the widow of the testator) of the first part, John Beale and his wife of the second part, and Richard Harrison of the third part. It recited the deed of May, 1840, and its due acknowledgment under the Act of Parliament, and proceeded thus: "Whereas the said John Beale, having occasion for 500*l.* hath requested the said Richard Harrison to advance the same upon the security of the hereditaments comprised in the said indentures of the 25th and 26th days of May, 1840, which the said Richard Harrison has consented to do, and the said Sarah Middleton hath agreed to join in such security with the said John Beale and Sophia his wife." It then witnessed, that in consideration of the 500*l.* to John Beale, with the privity and consent of his wife and mother-in-law, paid by Harrison, they Sarah Middleton and John Beale and Sophia his wife, "according to their respective estates, rights, and interests in the premises, and in exercise and execution of every power and authority in them or either of them vested or in any wise enabling them or either of them so to do," had and each of them had

* 198 limited and appointed, *and did and each of them did thereby limit and appoint, grant, bargain, sell, and demise

to Harrison the hereditaments in question, with their appurtenances, and with the usual additional words, to hold to Harrison for a term of 1000 years, subject to a proviso for redemption on payment of the 500*l.* and interest by Sarah Middleton and John Beale, or either of them or their representatives, in the usual terms. And Sarah Middleton and John Beale thereby covenanted with Harrison for payment of the money, and entered into the ordinary covenants of a mortgagor.

The widow executed this deed also. Subsequently, in 1846, after her death, the original plaintiff John Crofts paid Harrison his 500*l.*, and advanced to the defendant John Beale 500*l.* more; whereupon, as a security to Crofts, another indenture was executed by the defendant Beale, which was made between Harrison of the first part, Beale and his wife of the second part, and John Crofts of the third part. It recited the mortgage of 1842 by an erroneous date, but so as to leave no doubt as to what deed was meant. It further recited that all the interest on the 500*l.* had been paid, and that Sarah Middleton, who had a life-estate, died in the preceding month of July, and that Beale, being desirous of paying and discharging the 500*l.*, had requested Crofts to advance it; whereupon, in consideration of the 500*l.* paid to Harrison and 500*l.* more to Beale by John Crofts, Harrison, at the request and by the direction of John Beale and his wife, bargained, sold, assigned, and transferred and made over, and Beale and his wife appointed, granted, assigned, transferred, and confirmed to Crofts the hereditaments in question for the term, subject to a proviso for redemption framed in the ordinary manner.

* Mrs. Beale was an executing party to each mortgage, * 199 but her execution was as to each immaterial, inasmuch as there was no acknowledgment in either instance. She died before the year 1851 without ever having had issue. She left the defendant Samuel Middleton the elder her heir-at-law; and he and his son contending that of the deeds of 1840, 1842, and 1846 not one bound or affected the property, and claiming it accordingly, the questions arose which were the subjects of appeal.

The son claimed merely under a voluntary conveyance made by his father to him; and as the son and father, a short time before the institution of the suit, had brought an ejectment for the purpose of recovering possession of the property against Crofts, the original plaintiff in equity, he made that a subject of the present

bill, asking an injunction against the action. The prayer of the bill was as follows: That an account may be taken of what is due to the plaintiff for principal and interest on his said mortgage, and that the said defendants may be decreed to pay to the plaintiff, or as he shall direct, the amount of what shall be found to be due to him, together with his costs of this suit, by a short day to be appointed for that purpose by this honorable Court, the plaintiff being ready and willing, upon such payment being made, to reassign the said mortgaged premises to the said defendants or as they shall direct, and that in default of such payment being made, the said defendants and all persons claiming under them may be barred and foreclosed of and from all rights, title, and equity of redemption of, in, and to the said mortgaged premises. And that they, the said defendants Samuel Middleton the elder, and Samuel Middleton the younger, may be ordered to do and execute all such acts and deeds as are necessary and proper for vesting the said mortgaged premises in the plaintiff for the * 200 residue of the said term of * 1000 years. That in the mean time the said defendants Samuel Middleton the elder, and Samuel Middleton the younger, may be restrained by the order and injunction of this honorable Court from further prosecuting the action of ejectment so commenced by them as aforesaid. And there was the usual prayer for general relief.

By the decree under appeal it was ordered, that the bill should be dismissed, and the plaintiff by her counsel at the bar undertaking to give judgment in the action of ejectment in the pleadings mentioned, it was ordered that the dismissal should be without costs. The case is reported in the 2d volume of Messrs. Kay and Johnson's Reports. (a)

Mr. Rolt and Mr. E. F. Smith, in support of the appeal. — The first question is as to the construction of the will. On this we submit that Sophia's interest is not a contingent remainder, but a vested estate, subject to be divested in favour of her children. *Beck's Case.* (b) *Plunket v. Holmes* (c) is distinguishable from this case. If this be the true construction of the devise there can be no further question, for the limitation to the heirs and assigns

(a) Page 194.

(b) Cro. Car. 363; Fearne, Cont. Rem. 352.

(c) 1 Lev. 11; Fearne, Cont. Rem. 341.

of Sophia would in that case have united with her life-estate, and the whole fee would have vested subject only to be divested by an executory devise, which never took effect.

If, however, the Court should agree with the Vice-Chancellor in the construction of the devise, and should hold that Sophia took a contingent remainder, still we submit that the deed was sufficient to bind it, at all * events, in equity. Accord- * 201 ing to the law in force when the Act for the abolition of fines and recoveries was passed, a contingent remainder to which a married woman was entitled would have passed by a fine: *Doe d. Christmas v. Oliver*; (a) and by the 77th section of the Fines and Recoveries Act, (b) a married woman is enabled to dispose of lands or any estate which she may have in any land "as fully and effectually as she could do if she were a *feme sole*," and "estate" is by the interpretation clause defined as extending to an estate in equity as well as at law, and to any interest in lands.

[THE LORD JUSTICE KNIGHT BRUCE. — Could she have disposed of this interest by deed if she had been a *feme sole*?]

It is not necessary to put the case so high as that, for the Act does not say as effectually as she could do by deed, but simply "as she could do," that is, *quæcumque viâ*. The whole scope of the Act is the enlargement of the powers of married women, and it cannot be understood as intended to deprive them of the means of alienating a contingent remainder. Moreover, a *feme sole* can by devise or contract dispose of a contingent remainder. The Act for the abolition of Fines and Recoveries in Ireland (c) throws light on the case. Lord LYNTHURST, in *Baggett v. Meux*, (d) observed, with respect to one clause of that Act, that he took it as an expression by the legislature of what was meant by the English Act. Now, the preamble of the Irish Act declares that the word "estate" shall extend to any interest in lands, whether present or future, vested or contingent. Nor, from the provision of the 8 & 9 Vict. c. 106, § 6, which provides that contingent interests may be disposed of by deed, but that dispositions by

(a) 10 B. & C. 181.

(b) 3 & 4 Will. 4, c. 74.

(c) 4 & 5 Will. 4, c. 92.

(d) 1 Ph. 627.

married women shall be made conformably to the provisions of the Fines and Recoveries Act, is it * to be inferred, as was contended below, that married women could not, before that Act passed, have disposed of such interests; all that this enactment does is to declare that the acknowledgment required by the Fines and Recoveries Act is required in cases in which the later Act enables married women to convey. Even if the legal estate did not pass it is bound in equity. *Wright v. Wright*, (a) *Wood v. Lambirth*, (b) *Dowell v. Dew*, (c) *Bensley v. Burdon*, (d) *Right d. Jefferys v. Bucknell*. (e)

They also referred to *Hobbs v. Norton*, (g) *Raw v. Pote*, (h) *Stronge v. Hawkes*, (i) *Legh v. Legh*, (k) *Roberts v. Lloyd*, (l) *Fortescue v. Barnett*, (m) *Stead v. Nelson*, (n) *Owens v. Dickenson*. (o)

Mr. W. M. James and *Mr. Bevir*, for Samuel Middleton, the heir-at-law of the testator and of Sophia Beale. — The gift is a contingent remainder. A limitation cannot be construed as an executory devise or springing use if it can take effect as a contingent remainder. The case is not distinguishable from *Plunket v. Holmes*, (p) which has been followed ever since *Loddington v. Kime*, (q) *Banks v. Ollerton*. (r) It is equally clear that this interest, being a contingent remainder, could be bound by deed in no way except by estoppel: *Fearne, Cont. Rem.*, (s) *Doe d. Christmas v. Oliver*, (t) *Doe d. Brune v. Martyn*; (u) and * 203 there could be no estoppel here unless * there was a false recital that the grantor was seised in fee. But an estoppel by means of a false recital is not a means of binding an estate which can be supposed to have been contemplated by the Act.

(a) 1 Ves. Sen. 409.

(b) 1 Ph. 8.

(c) 1 Y. & C. C. C. 345.

(d) 2 Sim. & St. 519.

(e) 2 B. & Ad. 278.

(g) 1 Vern. 136.

(h) 2 Vern. 239.

(i) 4 De G., M. & G. 186.

(k) 1 Bos. & Pul. 447.

(l) 2 Beav. 376.

(m) 3 Myl. & K. 36.

(n) 2 Beav. 245.

(o) Cr. & Ph. 48.

(p) 1 Lev. 11.

(q) 1 Salk. 224.

(r) 23 Law J., Exch. 285.

(s) Page 365, 366.

(t) 10 B. & C. 181.

(u) 8 B. & C. 497.

Bensley v. Burdon, (a) *Right d. Jefferys v. Bucknell*. (b) The Fines and Recoveries Act introduces two modes of assurance, one for tenants in tail, another for married women; but it gives no power to a person *sui juris* to dispose of a contingent remainder. It was not until the 7 & 8 Vict. c. 75, § 5, passed, which was repealed and in part re-enacted by the 8 & 9 Vict. c. 106, and which has been referred to on the other side, that such interest could be aliened at law. The 6th section of that Act negatives the idea that the Fines and Recoveries Act had already given power to married women which the Act of the 8 & 9 Vict. c. 106, gave for the first time to unmarried women and men. But this is the whole foundation on which the argument on the other side proceeds; viz., that the 77th section of the Fines and Recoveries Act gave to *femes covert* a power which *femes sole* did not possess, notwithstanding the words of the Act, which are "as effectually as she could do if she were a *feme sole*." With regard to the equitable point, there is strictly no such thing as an equitable assignment of a legal interest. What is called an equitable assignment of a legal interest depends on the difference between the relief at law and in equity as to contract; Courts of Law giving damages and Courts of Equity enforcing specific performance. Now, the Act shows no intention whatever on the part of the legislature to enlarge the power of a married woman to enter into contracts relating to her real estate or to contract at all.

[THE LORD JUSTICE KNIGHT BRUCE. — If a married woman by deed should acknowledge the receipt of purchase-money, and agree to convey in consideration of such *payment *204 would that have no effect?]

That would, we submit, be a different case. It is unnecessary to notice the authorities referred to with regard to the separate estate of a married woman, which depend on wholly different principles from those involved in this case. If we admit for the sake of argument that a married woman has conferred upon her a power by the statute to contract for valuable consideration, here there is no such consideration whereon to found the contract. All that substantially appears or is expressed, is that the married

(a) 2 Sim. & St. 519.

(b) 2 B. & Ad. 278.

woman desired to settle or resetttle the estates in a particular manner.

[The Lord Justice KNIGHT BRUCE referred to *Jones v. Boulter. (a)*]

Dealings between husband and wife may certainly raise a consideration when the wife thereby gains a benefit, but not where, as here, the effect is to give the estate of the wife to the husband, nor is every consideration which would prevent a deed from being merely voluntary sufficient to give a title to relief by way of specific performance. As to contract, this Court will not direct a married woman to execute a conveyance of property not settled to her separate use. *Jordan v Jones. (b)*

[THE LORD JUSTICE KNIGHT BRUCE. — If the words, “as fully and effectually as if she were a *feme sole*,” had been omitted, would any difficulty have arisen, and does not your construction make those words confine the operation of the Act?]

Our argument is, that the Act was not intended to give a married woman greater power than a man or a *feme sole*.

Mr. Rolt, in reply.

Judgment reserved.

March 19.

* 205 * THE LORD JUSTICE KNIGHT BRUCE. — In the year 1851, John Crofts, the original plaintiff in this cause, was in the possession of some tenements at Newbury in Berkshire. He continued so during the residue of his life, and his personal representative, the present plaintiff, has ever since his death been so. Thus, at least, I understand the matter. The possession of each plaintiff was originally and has uniformly been referable to a mortgage title merely. The mortgage was made to the original plaintiff in the year 1846, by the defendant John Beale, who admits, as the plaintiffs respectively have all along admitted, that the relation

(a) 1 Cox, 288.

(b) 2 Ph. 170.

between Beale and the plaintiff for the time being has been always that of mortgagor and mortgagee, so that the suit having been in the year 1851 instituted for the purpose of foreclosure upon the mortgage, was, as between the original plaintiff and the defendant John Beale, and is as between him and the present plaintiff, a very simple matter, free from all difficulty.

But the suit had and has also another object, in which the two other defendants Samuel Middleton the elder and Samuel Middleton the younger, his sons, are concerned, and which has introduced complication and perhaps some difficulty into the case. The son claims merely under a voluntary conveyance alleged, and I believe admitted, to have been made by his father to him, and is neither in a better nor a worse position than Samuel Middleton the elder is, or but for the voluntary conveyance would have been. Both insist that one or each of them has a title to the tenements paramount the mortgage, and that neither of the plaintiffs nor the defendant John Beale had, when the suit was instituted, or now has, any legal or equitable right or interest in the tenements or any part of them, and the son and father in * the * 206 name of one or each of them (it matters not which) having accordingly a short time before the suit here brought an ejectment for the purpose of recovering the possession of the property against Mr. Crofts (the original plaintiff in equity), he made that a subject of his bill, seeking an injunction against the action. The prayer of the bill is in these terms: [His Lordship read it as set out. (a)]

There are answers which have been replied to and evidence, and at the hearing before one of the learned Vice-Chancellors, his Honor disposed of the case by the order now under appeal, which was thus: [His Lordship read the order to the effect above stated. (b)]

I understand that but for the undertaking as to the judgment at law, his Honor would probably or certainly have given to the Middletons their costs in equity; that the judgment in the action of ejectment was allowed to be taken accordingly, and that the Middletons' costs at law have been taxed and paid to one or both of them, or at least taxed, but that execution has not issued.

His Honor's decision was grounded upon his opinion as to the true construction of the will of Benjamin Middleton, who was for-

(a) *Ante*, p. 199.(b) *Ante*, p. 200.

merly seised in fee of the property, and whose heir-at-law, the defendant Samuel Middleton the elder, is, and originally was, and as to the nature and extent in the year 1840 of the powers and capacity of alienation belonging to a married woman, the owner of a contingent remainder in fee in freehold lands of inheritance, in which she has either in possession or in remainder a previous vested estate for life.

* 207 * The matter stood thus: Benjamin Middleton's will, which devised the tenements in question to his daughter Sophia Middleton, was, so far as for the present purpose important, thus expressed: [His Lordship read it to the effect above set out, and proceeded to state the facts of the case nearly in the words in which they are above stated, and proceeded as follows:] The questions which I shall now notice have, in consequence, been brought under discussion.

The first is that of the construction of Benjamin Middleton's will, two and only two interpretations of which have or indeed could reasonably have been suggested. The respective interests and positions, however, of the plaintiff and the defendant Beale render it unnecessary as between them to state an opinion which of the two suggested constructions is correct, and as between the plaintiff and the other defendants (the Middletons), it is equally unnecessary, as I purpose to deal with the case upon the principle of assuming in favour of those defendants, and accordingly I do assume, for all the purposes of the suit, that the will, so far as we are concerned with it, is not in any material respect distinguishable from the will, judicially construed in the suit of *Plunket v. Holmes*, and is and ought to be governed in point of interpretation by that authority. Though, whether in truth the will before us is so distinguishable, or is or ought to be so governed, I express no opinion. If the construction that as between the plaintiff and the defendants the Middletons I assume to be correct, as I have mentioned, is not correct, the plaintiff and the defendant Beale are the only parties to this record who have any title to the property in question or any interest in any portion of it.

The plaintiff claims, however, an equity against the

* 208 * Middletons, founded on the circumstance that Mr. Beale, in and after the year 1842, expended considerable sums in building upon the property, and that the expenditure was contemporaneously known to the elder Samuel Middleton, and founded

also on the belief of the title of Beale and his wife, which Beale entertained and acted on, and the elder Samuel Middleton's contemporaneous knowledge of that belief; and founded, moreover, on the circumstances and manner in which the money raised on mortgage was, with the contemporaneous knowledge, as it is alleged, of the elder Samuel Middleton, raised and applied. But the grounds and materials of this supposed equity are, upon the evidence before the Court, too weak and shadowy to be available, and must be disregarded.

It fails on the facts, and there remains but one point, — a question upon the Statute 8 & 4 Will. 4, c. 74, — the defendants the Middletons insisting that by reason of this statute, or notwithstanding this statute, the property is altogether free from the operation of the deeds of 1840, 1842, and 1846 respectively; the plaintiff, with the concurrence of the defendant Beale, maintaining that, in the view of this Court at least, if not both at law and in the view of this Court, the property is effectually bound by those instruments.

Before, however, entering on this question, it may be as well to consider how the case stands in point of jurisdiction against the defendants the Middletons, upon the supposition of the plaintiff being at law entitled to the benefit of the mortgages of 1842 and 1846. It is clear that if either of these instruments affected the property beyond the lives of Mrs. Beale and her mother, each did so equally. It is also clear that if they now affect the property equitably and not legally, there must * be a * 209 decree for the plaintiff against the defendants the Middletons, in whom, or one of whom, the legal estate on that theory is vested in trust for the plaintiff and Beale. It is likewise certain that if the instruments now affect the property legally they equally do so equitably.

But in that view a question was raised, whether there is jurisdiction here against the Middletons. I assume that there is, for before the suit they brought the action of ejectment for the purpose and in the circumstances that I have stated, and I conceive that where a person is in possession of land by a good equitable right, and the title is so circumstanced as that the legal estate is either in himself or in another as a trustee for the person in possession, and an action of ejectment is brought against the man in possession by the other claiming the equitable as well as the legal right, and

denying the legal as well as the equitable title of the person in possession, he is entitled in a Court of Equity to relief against the other by way of injunction, if not by way of conveyance and injunction, in whichever of the two the legal estate may in truth be vested ; inasmuch as the plaintiff in the ejectment would, recovering in the action, hold merely as a trustee for the defendant in it. So here the two Middletons, if they are, having regard to the Statute of 3 & 4 Will. 4, and the facts, well founded in their view of the alleged legal title, but not well founded in their view of the equitable title, would, recovering in the ejectment, hold its fruits as trustees for Mrs. Crofts or for her and Beale ; and accordingly in my judgment are, whether right or wrong in point merely of law, liable if wrong, as to the beneficial interest, to be restrained by injunction from legal proceedings adverse to her possession. She is entitled therefore, in my opinion, to a decree against the Middletons if, and not unless, she is either legally or equitably entitled to the benefit of the mortgages of 1842 and 1846 * as present charges on the tenements devised, as I have said, to Sophia Middleton by Benjamin Middleton's will.

Has, then, the plaintiff this right upon the assumption of the true interpretation of the will being such as I have stated myself to assume ? A question, the answer to which depends upon the construction to be put on the Statute 3 & 4 Will. 4, c. 74, and especially its 77th section considered, as that section ought to be, in combination with the rest of the statute, and with some knowledge of the English law on the subject of the alienation or transfer of interests in immovable property, as that law stood immediately before the passing of the Act ; and especially some knowledge of the nature, operation, and effect of fines and recoveries and the power and capacity of married women as to real estate according to the same law at that time.

I represent the question as depending on the construction to be put upon the statute, inasmuch as it is clear that the defendants the Middletons have neither interest nor right unless they can establish three propositions.

First. That the will ought to be considered as substantially one of the same character as the will construed in *Plunket v. Holmes* ; that *Plunket v. Holmes* ought to govern the case so far as testamentary interpretation is concerned ; and that accordingly an estate of inheritance did not at any time, either in possession

or in remainder, vest in Sophia Middleton, subject to be divested in case she should leave a child or issue; a proposition which, as already stated, I assume to be granted to the defendants the Middletons and so decided in their favour, though I give no opinion upon it.

* Secondly. That by the English law, as it stood immedi- * 211
ately before the passing of the Statute 3 & 4 Will. 4, c. 74, a contingent remainder in fee could not legally pass by means of a mere deed of grant, and could not merely by a voluntary deed of grant, a deed not supported by valuable consideration, pass in equity. Or, to state the proposition by an example, that if land had been settled to the use of A. for life, with remainder to the use of B. in fee if A. should die without leaving issue living at A.'s death; but if A. should leave issue living at A.'s death, then to the use of C. in fee, C., before the statute, could not by a deed of grant during the joint lives of the three pass the inheritance legally or without valuable consideration equitably; a proposition also which, without giving an opinion upon it, I assume to be granted to the defendants, the Middletons, and so decided for them. Though I may observe that I am not by any means satisfied that a conveyance or an assignment of property ineffectual at law, nor creating the relation of trustee and *cestuis que trust*, nor having the support of a valuable consideration, is necessarily not effectual in equity; a point with regard to which I need not refer to *Wright v. Wright*, (a) cited during the argument; to *Theobald v. Defay*, in the House of Lords, mentioned, I think, in *Wright v. Wright* and elsewhere,—it is indeed reported at one stage in 9 Modern Reports, (b) — or to the case of *Kekewich v Manning*, (c) decided by Lord CRANWORTH and myself, in which there was a citation of a great body of authorities.

The last of the three propositions is that the Statute 3 & 4 Will. 4, c. 74, does not help or extend to the plaintiff's case, Mrs. Beale having been under coverture * from a time preceding * 212
the testator's death to her own, and that accordingly the Middletons have the same title as if the statute had not been passed.

Of this third proposition, which is founded on the assertion that

(a) 1 Ves. Sen. 409.

(b) *Theobalds v. Duffoy*, 9 Mod. 102.

(c) 1 De G., M. & G. 176 [and cases in note (1)].

the 77th section of the statute only enabled a married woman to do by deed what a single woman could have done by deed before the statute, and that a married woman was unable before the statute and not enabled by the statute to contract, I proceed to state what I think. My opinion is that the Middletons are wrong in it and cannot sustain it. For, whether regarding or not regarding as of any moment the title of the statute, we may and must, as I conceive, collect from the body of it that its main or rather only design, intent, and object were such as in fact the title happens to express in these its words: "An Act for the Abolition of Fines and Recoveries and for the Substitution of more Simple Modes of Assurance." There does not occur the least reason to believe that those who framed or those who passed the Act desired or meant to prevent or restrain either the voluntary or any other alienation of any property or interest which immediately before the passing of the Act was either voluntarily or for value alienable. What rational advantage, what reasonable end could there have been to be attained by disabling a married woman and her husband from disposing, for or without valuable consideration, of a contingent remainder, which before the statute they were able to dispose of? The 77th section is probably less carefully framed than some other parts of the Act. In particular I think that the phrase "and also," where those two words first occur together in the section, was meant to be and must be understood as being equivalent to "that is to say." Then with regard to the words "as fully and effectually as she could do if she were a *feme sole*," they

* 213 were not, as I conceive, intended * to restrict or lessen any power, capacity, or right conferred by the preceding portion of the section, but were, in my judgment, used as importing and meaning neither more nor less than "notwithstanding her coverture," and the words "estate" twice occurring and "have" once occurring in the section are, in my opinion, shown plainly by the rest of the statute, as well as by the interpretation that has been put on the Acts of Henry the Eighth mentioned by Lord KENYON in *Jones v. Roe*, (a) and his Lordship's observations there, to be sufficient for including and to include a contingent remainder.

But let it be supposed and granted that the passage "as fully and effectually as she could do if she were a *feme sole*" ought not to be read exactly as I have said, what then does it mean? It

(a) 3 T. R. 88.

means, I think, substantially the same thing. For the words "could do" must then, I conceive, be understood as referring to all the forms and modes of disposition, of release, of surrender, of extinguishment, which in respect of lands and interests in lands were by the English law as it stood immediately before the passing of the Act open to single women. To read the words as the Middletons desire to have them read is, in my opinion, to impute to the legislature something more and worse than without absolute necessity should be imputed. What reason, I repeat, is assignable for a measure such as that of disabling a woman and her husband from levying a fine and from suffering a recovery without providing for them some other mode of doing what the argument supposes them previously able by fine and recovery or in one of those modes (and not otherwise) to do effectually or to do at law effectually?

It may be and it has been urged that the Act, though disabling all persons from levying fines and suffering recoveries, * yet left men and single women at least either unable or * 214 less able to deal with a contingent remainder in fee-simple, and with some other executory or contingent interests in land which before the Act might effectually have been legally as well as equitably dealt with. Whether this was the effect of the statute I need not and I do not say. But if it was so the error or oversight can furnish no reason for not interpreting, according to convenience, justice, common sense and the general intention of the Act, words contained in it that are susceptible of such an interpretation. Error, if possible, should be repressed rather than extended. Why, if there is one oversight, should that be a reason in favour of two? If it was rational and right to make a certain provision in favour of all men and women, married and single, and we can find words capable of being interpreted as making that provision in favour of married women, are they not to be so interpreted because men and single women have been, if they have been, so far forgotten? Among the many useful maxims recorded by Sir E. Coke (some of which we are too apt practically to forget) is, "*Nemo aliquam partem rectè intelligere possit antequam totum iterum atque iterum perlegerit*," and the first book of the Digest tells us, "*Incivile est nisi totâ lege perspectâ unâ aliquâ particulâ ejus propositâ judicare vel respondere*." (a)

(a) Dig. lib. i. tit. iii. 24.

Now the 77th section, for the reason that it states, purposely avoids providing for tenancies in tail. They are left to the rest of the statute, the 15th section of which thus provides: "And be it further enacted, that after the 31st day of December, 1833, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee-simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands

* 215 * entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorized to be made." Of course this includes married women, as the 40th section shows. That section is thus: "And be it further enacted, that every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee-simple absolute: provided, nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity under this Act unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied or otherwise, and, whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed."

Can it be contended to be rational that, what a married
 * 216 woman having a contingent remainder in tail may do, * a
 married woman having a contingent remainder in fee

should be disabled from doing? "Leges ex mente intelligendæ." Nor can it surely be wrong to apply to remedial statutes, such as that before us, the recommendation applied by COKE in *Edward Lord Cromwell's Case* to common assurances; namely, to expound and construe them "without prying into them with eagles' eyes." Paulus, I think, had be foresaid, "Non oportere jus civile calumniari neque verba captari sed quâ mente quid diceretur animadvertere convenire." Sometimes as Quintilian expresses it, "Scriptum est quod apparet scriptorem voluisse." The well-known story of the invalid passenger who claimed the cargo is introduced by the equally well-known words, "Ex scripto et sententiâ nascitur controversia cum videtur scriptoris voluntas cum scripto ipso dissentire." I adhere to what was said in *Key v. Key*, (a) a case upon a will: "In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of the instrument, not to be satisfied from its contents, that a literal and strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument read as a whole persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."¹

The rules of interpretation in this respect applicable to private instruments, exemplified strongly by that case (a decision in which my learned brother joined), by *Green v. Hayman*, (b) which Viner notices, *Doe v. Allcock*, (c) and others almost innumerable, are, so far as is * compatible with the different positions of * 217 the makers, applicable also to written laws, as by a host of great authorities in this and other ages and countries has been declared and demonstrated. I need not refer to Pufendorf, or in our own country to *Haydon's Case*, the case of Lincoln College, and other portions of COKE's writings. Two passages in Plowden, not unfamiliar to us, are these: In the case of *Willion v. Berkeley*, (d) he says, "and Anthony Brown said, although the saving had not been in the Act, yet it should have been implied by the intent of the makers, for the intent of the Act was to make the

(a) 4 De G., M. & G. 84, 85.

(c) 1 B. & Ald. 137.

(b) 2 Ch. Ca. 10.

(d) Plowd. 231.

¹ See *Key v. Key*, 4 De G., M. & G. 73, n. (1), and cases cited.

Queen have such capacity as is expressed in the Act, and to this intent only the Act enures, and not to all other intents; and whoever would consider an Act well, ought always to have particular regard to the intent of it, and according as the intent appears he ought to construe the words." And again, in the case of *Stradling v. Morgan*: (a) "And so they have qualified the rigour of the word 'presently' according to reason in such manner as the intent of the makers of the Act might be presumed to be. From which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and

* 218 sometimes by foreign circumstances. So *that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." Sir F. Dwaris's very useful book abounds in examples, and surely the exposition of a statute, that the plaintiff asks here, is not more difficult nor less required by reason and the general good than those of the Court of Queen's Bench in very modern times, when in order to avoid highly inconvenient and oppressive consequences from the literal construction of parliamentary language, the Judges held in one case, (b) that dead partridges were not to be deemed partridges, and in another were ready to declare oysters not to be fish. (c)

Let us suppose it, however, to be conceded to the Middletons, that their construction of the statute is correct: still that may avail them nothing in this Court, at least if the transaction of 1840, followed as it was by the deeds of 1842 and 1846, ought to be considered as having the foundation or support of a valuable consideration. And without laying any stress on the tenancy for life

(a) Plowd. 205.

(b) 3 B. & Ad. 134.

(c) 2 Mau. & Sel. 568.

free from impeachment of waste professed or attempted to be given to Mrs. Beale, or on the fact that the transaction of 1840 could not have been effectuated without the concurrence of the husband and wife (circumstances which may perhaps be reasonably argued to be sufficient of themselves to make value an ingredient in it) I am of opinion that the works and expenditure of the husband on the property before and after the deeds of 1840, the commencement of which is mentioned in a recital, that I have already stated, containing the words "therefore desirous," the advance of 500*l.* by Harrison to Beale on the mortgage of 1842, and the * concurrence of Sarah Middleton in that mortgage and * 219 its covenants (both which must have been done in the faith of the efficacy of the deeds of 1840), and the advance of 1000*l.* by Crofts in 1846 on the same security and in the same faith, were and are sufficient to establish that as against Mrs. Beale and her heirs the transaction of 1840 ought now to be treated as a transaction for valuable consideration and thus effectual, at least in equity. How can it be known or thought likely that Beale would or could have built or borrowed as he did but for that transaction? Or how that Sarah Middleton would have become his surety to Harrison? The mortgages are of course intimately connected with it and dependent on it, and for some, if not all, purposes the term of 1000 years created under a general power in the deed of release of 1840, stands on the same footing as if created directly, immediately, and at once by that deed.

But it is conceded, that had Mrs. Beale, being a single woman, granted by deed her contingent remainder in fee (if her interest in the inheritance ought so to be designated) to a purchaser for value, the grant would at least in equity have been effectual, and I have neither heard nor read any thing which has had the effect of convincing me that in 1840 Mrs. Beale was not capable of effectually contracting in equity, and did not by the transaction of 1840, accompanied and followed as it was, effectually contract in equity, if not at law and in equity, to part with the inheritance in question. I do not say that she was able to contract so as to expose herself to pecuniary liability or to have damages recovered against her. I use the words "contracting" and "contract" in the sense of binding her estate of inheritance, contingent or not contingent, in the tenements in question equitable, if not both legally and equitably.

* 220 * On the whole we are of opinion (the reasons of my learned brother not substantially or not at all differing from those already stated) that the title of the Middletons, at least their equitable title if not their legal title also, fails; and that the order or decree to be now made, must, as between the present plaintiff and the defendant Beale, be an ordinary foreclosure decree, treating the two plaintiffs as successively mortgagees in possession. That, as between the present plaintiff and the Middletons, they must be perpetually restrained by injunction from issuing execution under the judgment in the ejectment and from taking any proceedings at law or otherwise, for the purpose of evicting or disturbing her from or in the possession of the tenements in question or any part of them, and that the costs at law of defending the ejectment, and confessing or giving the judgment must be paid by the Middletons, who are to return the costs at law, if any, paid to them or either of them by Mrs. Crofts. But with regard to the costs in equity, the Middletons having had a decision in their favour pronounced by a Judge of great weight and distinction (independently of the ground on which the plaintiffs unsuccessfully, in our opinion, endeavoured to stand) we think that there should be none given against the Middletons, who will of course receive no costs. The present plaintiff's costs of the appeal are to be costs in the cause as between her and the defendant Beale.

THE LORD JUSTICE TURNER. — I have nothing to add except that I entirely agree both in the result and the reasons.

1856. March 5, 6, 19. Before the LORDS JUSTICES.

A testator by his will gave the dividends of specific sums of stock of different amounts to his sons and daughters by name respectively for their respective lives, and on the death of any son or daughter he gave the capital sum of which he had given the dividends to such son or daughter, to his or her children at twenty-one, and if no such child attained twenty-one, the said capital sum was to fall into the residue, the interest of which he bequeathed to his widow for life, and after her death to the sons and daughters "dur-

ing their several and respective lives, to be divided between them," in proportion to the specific sums of stock of which the dividends were bequeathed to them respectively. After "the decease" of the testator's "said children," the capital of the residue was to be divided among the children's children at twenty-one, and if any grandchild died under twenty-one, its share was to be divided among the survivors at twenty-one or their issue, and after the death of the widow and all the testator's "children and grandchildren without issue as aforesaid," over. By codicils the testator revoked the bequests to two of his sons and a daughter, and gave them for their lives the dividends of smaller specific sums of stock than those so given by the will: *Held*, —

1. That, under the will, the income of the residue was divisible among the children, and the survivors and survivor of them, till the death of the last survivor.
2. That the codicils only revoked the gifts of the dividends.¹
3. That the dividends, the gifts of which were revoked, were not undisposed of, but passed by the residuary bequest as income to those tenants for life of it whose interests were not revoked.

THESE were appeals from a decision of Vice-Chancellor KINDERLEY, upon the construction of the will and codicils of a testator named John Hill.

By his will dated the 8th of August, 1817, the testator bequeathed to his wife Hannah Hill the dividends of 6666*l.* 13*s.* 4*d.* 3*l.* per cent consols, part of the stock then standing in his name, during her life for her separate use, with a proviso for the event of her marrying as therein mentioned, and after her decease or marriage contrary to the proviso, he directed that the capital should sink into the residue. He then bequeathed to his daughter Anna Hill 550*l.*, further part of the above stock, to be paid to her at twenty-one for her separate use, and in case she should die before that age leaving children, he directed the said sum of 550*l.* and all dividends due at her death to be equally divided among all such children, and if but one all to such one, at their respective ages of twenty-one, but in case his said daughter *should * 222 die under twenty-one without leaving any child or children, or leaving such in case they should all die under twenty-one, then he directed the said sum of 550*l.* and all accumulated dividends to sink into the residue. He also gave to the same daughter the dividends of the sum of 2333*l.* 6*s.* 8*d.*, further part of the same

¹ In dealing with such cases, it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. See 1 Jarman Wills (3d Eng. ed.), 162 *et seq.*

stock, during her life, for her separate use, and after her decease he gave the last-mentioned sum, with all dividends then due or accumulated thereon, unto her children equally at twenty-one, and if but one the whole to such one, the interest and dividends to be applied to their maintenance, but in case all should die under twenty-one he directed that the said sum should sink into the residue. He then directed that the dividends of the above sums of 550*l.* and 2333*l.* 6*s.* 8*d.* stock should be applied in the maintenance of the same daughter during her minority, and that the residue, if any, should be invested and accumulated for the benefit of herself and children. He then bequeathed sums of 1533*l.* 6*s.* 8*d.*, other parts of the above stock, for the benefit of each of his other daughters Elizabeth Hill, Sarah Hill, Georgina Hill, and Caroline Hill, and their respective children, in the same way as the above sum of 2333*l.* 6*s.* 8*d.* was bequeathed for the benefit of his daughter Anna and her children. He then bequeathed unto his son John George Hill the dividends of 1000*l.*, further part of the stock, for his life, and after his decease the testator bequeathed the said sum of 1000*l.* stock in the following words: "Unto all and every the child and children of my said son John George Hill, to be equally divided between them, share and share alike, on their attaining their respective ages of twenty-one years, and if but one, then the whole to such only child; and I direct that the interest or dividends thereof be paid and applied for their, his, or her maintenance, education, and bringing up during their, his, or her

* 223 minorities or minority, but in *case all such child or children shall happen to die under the age of twenty-one years, then it is my will that the said sum of bank annuities shall sink into the residue." The testator then gave 1200*l.*, further part of the stock, to another son named George John Hill, and his children in the same terms as the bequest to his son John George Hill, but with a proviso that in case George John Hill should happen to be under age at the time of the testator's death, the dividends should be applied to the son's maintenance during his minority. The will also contained a proviso that if any of the persons entitled to the dividends of the above sums should attempt to anticipate them, then the capital from which such dividends should arise should sink into the residue, and a proviso that if there should not be a sufficient sum of stock in the 3*l.* per cent consols at the time of the testator's decease to answer all the

aforesaid bequests, no deduction should be made out of the provision made for the widow, but that the deficiency should be borne by the said several bequests, and that they should abate according to their respective amounts. The residue was bequeathed upon trusts for realization and investment in consols, the dividends of which were to be paid to the widow for her life for her separate use, subject to the same restrictions and conditions as the dividends of the 6666l. 18s. 4d. consols thereinbefore directed to be paid to her, in the same manner as if the words of that bequest were there repeated, and after her decease or such marriage as before mentioned, upon trusts expressed as follows: "To pay the said last-mentioned dividends as well as the interest and dividends of all other my stocks, funds, and securities, and residuary estate whatsoever, when and as the same dividends and interest shall accrue and grow due, unto, between, and among all and every my said seven children hereinbefore named, that is to say, Elizabeth Hill, Sarah Hill, Georgina Hill, Caroline Hill, John George

* Hill, George John Hill, and Anna Hill, or such of them * 224

as under the terms of this my will shall be then entitled thereto, during their several and respective lives, which said last-mentioned dividends shall be divided between them in the proportions which the yearly dividends hereinbefore specifically bequeathed to them respectively bear to each other, and from and after the decease of my said children, upon trust to pay the principal or capital of my said residuary estate unto, between, and among the children of all my aforesaid seven children, share and share alike, on their attaining their respective ages of twenty-one years. But in case any or either of my said grandchildren shall happen to die without leaving any child or children, him or her surviving, or, there being any such, all of them shall happen to die under the age of twenty-one years, and without issue, then the share or shares of my said grandchildren so dying to go and be divided unto, between, and among all and every my surviving grandchildren, share and share alike, on their attaining such ages as aforesaid." And after providing for the maintenance and education of the grandchildren during their minority, the testator provided for the event of all the grandchildren dying without issue as follows: "I give all the principal and capital of my said residuary estate and other the trust moneys hereinbefore mentioned after the decease of my said wife and all my said children and

grandchildren without issue as aforesaid, unto and equally between all and every the children of my late sister Catherine Nutland lawfully begotten, share and share alike." The will then contained a proviso that the bequests of the residuary property thereinbefore bequeathed should be subject to the like proviso of forfeiture in case of anticipation as was thereinbefore provided with respect to the dividends of the several specified sums of stock.

* 225 * The testator made two codicils to his will. The material parts of the former (which was dated the 4th of March, 1822) were the following:—

"Whereas I did in and by my said will give and bequeath unto my son John George Hill the interest of 1000*l.* in the £3 per cent consols in the Bank of England, and at the death of my dear wife Hannah Hill to share with my daughters the interest of any money arising from her death as in my said will is directed for his natural life, now I do revoke and make void the said legacy, and I do give unto the said John George Hill the interest of 666*l.* 13*s.* 4*d.* in the 3*l.* per cent consols in the Bank of England for his natural life and no more, under such regulations as my will directs. I also did in my aforesaid will give and bequeath unto my son George John Hill the interest of 1200*l.* 3*l.* per cent consols in the Bank of England, and at the death of my dear wife to share with my daughters the interest of any money arising from her death: I now do revoke and make void the said legacy, and do give and bequeath unto the said George John Hill the interest of 666*l.* 13*s.* 4*d.* in the 3*l.* per cent consols in the Bank of England, for his natural life and no more, under such regulations as my said will directs; and I do hereby ratify and confirm my said will in all the other particulars thereof."

The other codicil, dated the 11th of November, 1823, was so far as material as follows:—

"Whereas I did in my said will give and bequeath unto my eldest daughter Elizabeth the interest of 1533*l.* 6*s.* 8*d.* in the 3*l.* per cent consols in the Bank of England, and at the death of my dear wife Hannah Hill (late Williams) to share with her
* 226 brothers and * sisters in such proportions as in my said

will is directed for her natural life: now I do revoke (from the date of this codicil) and make void the said legacy, and do give unto my afore-named daughter Elizabeth the interest of 333*l*. 13*s*. 4*d*. in the 3*l*. per cent consols in the Bank of England, under such regulations and in such proportions as my said will directs. N.B. This alteration in regard to my said daughter Elizabeth arises from her having become possessed of a yearly property, the amount of which is more than her share in my property would amount to and which I have no right or control over. I also by this codicil order and direct my executors and executrix of my aforesaid will at my death to deduct the amount of any sum or sums of money that may have been had or advanced to any of my daughters hereafter named, that is to say, to Sarah, Georgina, or Caroline, that may have been had or advanced to either of my above-named daughters in my life, and that the interest of any sum or sums of money so advanced be deducted out of any share which may become their portions of any of my property at my death as heretofore directed and ordered in my said will and testament. I also direct that nothing herein directed and ordered may interfere in regard in any manner to what in my will and testament is given and bequeathed to my wife Hannah Hill or her daughter Anna Hill in my said will and testament dated the 8th of August, 1817. And I do hereby ratify and confirm in all other things the particulars thereof of my said will."

The testator died in October, 1824. His son John George died in April, 1839, leaving a son, who attained twenty-one and died in 1851. The widow died in September, 1839. George John died in December, 1843. Of the five daughters three had married, but there had been no * issue of any one of them, * 227 except one child who died under twenty-one.

The daughters, except Elizabeth, were the plaintiffs. The following was the substance of the decree under appeal:—

Declare that during the lives of John George Hill and George John Hill, both since deceased, the difference of interest between their larger legacies given by the will and their smaller legacies given by the first codicil, fell into the residue of the testator's estate, and that during the life of the defendant Elizabeth Hill the difference of interest between her larger legacy given by the

will and her smaller legacy given by the second codicil also fell into the residue.

Declare that the codicils did not operate to revoke the larger legacies of the said three persons and their children except to the extent of the life-interests of the same three persons.

Declare that the one-seventh part given by the will to George John Hill during his life of the income of the residuary estate after the death of the testator's widow, and revoked by the first codicil, ought to go with the capital of that share.

Declare that the one-seventh part given by the will to the defendant Elizabeth Hill during her life of the income of the residuary estate after the death of the testator's widow, and revoked by the second codicil, ought to go with the capital of that share, which capital will be divisible at her decease, and that on the death of the testator's widow the share of capital, of which John * 228 George Hill was by the will made tenant * for life and revoked by the first codicil, went to his two children George Hill and Charles Thomas Hill, both then infants, being the only grandchildren of the testator then living, so as to become vested interests on their respectively attaining their ages of twenty-one years, and which said George Hill is since deceased, having attained that age.

Declare that, on the death of the said George John Hill without issue the share of capital of which he was by the will made tenant for life, with the accumulations of interest thereon, went to the said George Hill and Charles Thomas Hill, both then infants, being the only grandchildren of the testator then living, so as to become vested interests on their respectively attaining their ages of twenty-one years, and which said George Hill is since deceased having attained that age.

Declare that on the death of the plaintiff Anna Alt without issue the share of capital of which she was by the will made tenant for life, with the accumulations of interest thereon, went to the said George Hill and Charles Thomas Hill, both then infants, being the only grandchildren of the said testator then living, so as to become vested interests on their respectively attaining their ages of twenty-one years, and which said George Hill is since deceased having attained that age.

Mr. James and Mr. Selwyn, for the plaintiffs. — First. The

smaller legacies given by the codicil are entirely in substitution for the larger given by the will as to capital as well as income. Secondly. If the Court should not take this view, at least the difference of income went to the tenants for life of the residue as part of the income arising from it. Thirdly. The codicils having reduced the income payable to three of the legatees, the * others took the difference. Fourthly. The grandchildren * 229 take nothing till all the children have died.

They referred to *Pearce v. Edmeades*, (a) *Tuckerman v. Jeffries*, (b) *Armstrong v. Eldridge*, (c) *Townley v. Bolton*, (d) *M'Dermott v. Wallace*. (e)

Mr. Shapter, for Elizabeth Hill. — The revocation by the codicils extended to the capital of the residue, and there is an intestacy as to the revoked shares.

He referred to *Boulcott v. Boulcott*, (g) *Darley v. Langworthy*. (h)

Mr. Stiffe, for the surviving executor of the testator.

Mr. Lee and *Mr. Birkbeck*, for the personal representative of the deceased plaintiff Anna Alt, formerly Anna Hill. — The words, "from and after the decease of my said children," mean after their respective deceases. The life-interests in the particular funds were clearly revoked as to part, and the difference of interest fell into the residue, and as to this there was intestacy, three of the residuary legatees being the legatees whose legacies were revoked. Mrs. Alt, as one of the next of kin, was entitled to a share in this undisposed-of income. Also there was no survivorship among the children.

They referred to *Jones v. Randall*, (i) *Cunningham v. Murray*, (k) *Wicker v. Mitford*, (l) *Pery v. White*, (m) * 230

(a) 3 Y. & C. 248.

(b) Holt, 370.

(c) 3 Bro. C. C. 215.

(d) 1 Myl. & K. 148.

(k) 1 De G. & Sm. 386; and on appeal, 12 Jur. 547.

(l) Hargrave, Law Tracts, 511.

(e) 5 Beav. 142.

(g) 2 Drew. 25.

(h) 3 Bro. P. C. 359.

(i) 1 Jac. & W. 100.

(m) Cowp. 777.

Wyndham v. Wyndham, (a) *Humble v. Shore*, (b) *Sanford v. Sanford*. (c)

Mr. Glasse and *Mr. Welsh*, for Charles Thomas Hill the grandson.

Mr. Baily and *Mr. Pearson*, for the personal representative of John George Hill.

Mr. Selwyn, in reply.

Judgment reserved.

March 19.

THE LORD JUSTICE KNIGHT BRUCE. — This cause brings before the Court for construction the will and codicils (two in number) of John Hill. The codicils, at least when read in conjunction with the will, are of difficult interpretation; and the will also, in one respect, if not in more, is reasonably open to difference of opinion as to its meaning. During the argument *Armstrong v. Eldridge*, (d) and various other authorities, were cited. But as to the construction of instruments such as these codicils, and perhaps of an instrument such as this will, few if any decisions of Judges, however eminent, upon other testamentary documents, can be thought likely to be very serviceable. I may observe, however, that in *Garland v. Thomas*, (e) Sir J. MANSFIELD, speaking of *Armstrong v. Eldridge*, says, "In the case of *Armstrong v.*

* 231 *Eldridge* the testator, after directing the * trustees to pay the proceeds of an estate equally between his two granddaughters for their lives, says: 'And after the decease of the survivor of them in trust to pay to and amongst all the children of the devisees.' Now, whatever might be the meaning of the former words of the devise, it was impossible to say that the testator meant that the children of his granddaughter should receive any thing until all his granddaughters were dead; for the limitation to the children is not to take place until after the decease of the survivor of the first devisees."

(a) 3 B. C. C. 58.

(d) 3 Bro. C. C. 215.

(b) 7 Hare, 247.

(e) 1 Bos. & Pul. N. R. 90.

(c) 1 De G. & Sm. 67.

The first question here is as to the title to the income of the testator's residuary personal estate from the death of his widow in 1839 to the death of the survivor of his children (an event which has not yet happened), so far as that title depends on the will independently of the codicils. And I am of opinion that the meaning and intention of the will were to give that income after the widow's death to the testator's children and the survivors and survivor of them until the death of the last survivor; but in what proportions among themselves until the death of the last survivor but one, we are, as I understand, not asked or wished to say. I do not forget that the words "during their several and respective lives," and "divided between them in the proportions," are in the will, yet not only is the word "deceases" not accompanied or explained by the word "several" or the word "severally," the word "respective" or the word "respectively" (words, however, which no doubt could be supplied by construction if necessary), but the gift of the residue to the grandchildren is expressed as a gift to one class, under which all were to become interested in the whole in possession at one time, and the passage also "after the decease of my said wife and all my said children and grandchildren without issue as aforesaid," appears to show that the children of the testator's sister * Catherine Nutland were not meant * 232 to take any thing of the residue in possession so long as any of the testator's children should be alive.

Then, with regard to the interests of the testator's grandchildren under the will, it is to be observed that only three grandchildren of the testator have been born, that they all came into existence after his decease, and it has been assumed at the bar, and I assume, that not any other grandchild of the testator has come or will come into existence. Of these three grandchildren one only is alive, and he is a minor. Another died in the first year of his age, in the year 1829. He was a son of a daughter of the testator, who is still living. The third of the testator's grandchildren was George Hill, who was a son of John George Hill, a son of the testator, attained majority, and afterwards died a bachelor in the year 1851. John George Hill died in the year 1839. He was the father also of Charles Thomas Hill, the only living grandchild of the testator. I am of opinion that, according to the true construction of the will, George Hill, one of the deceased grandsons, acquired under it a vested and transmissible interest in capital, both

as a specific legatee and as a residuary legatee, but that the other deceased grandchild of the testator did not attain under it a vested or transmissible interest in any thing.

Next comes the question as to the two codicils, with regard to which my mind has fluctuated, nor after much consideration do they appear to me in the light in which at first they did. I am of opinion that, even without laying stress on the express ratification and confirmation of the will contained in the two codicils, the effect of each or either of them is not to create or cause a partial

intestacy ; that — as evidently here as with respect to the

* 233 * real estate involved in the case of *Doe v. Allcock* (a) — it

was not the testator's intention to die intestate as to any portion of the beneficial interest in the income or capital of his personal estate, and that he has not so died. Nor do I think that by the codicils or either of them he intended to defeat or lessen, or has defeated or lessened, any right or interest which under the will alone, in the absence of any codicil, the grandson now living or any deceased grandchild of the testator would have taken or had, at least as events have happened. But what the testator has by the two codicils respectively dealt with is, I think, only a portion of such income as under the will, independently of the codicils, his two sons and their sister Elizabeth would during their lives respectively have been entitled to. I conceive that one-third of the income of the legacy of 1000*l.* stock given by the will to the testator's son John George Hill and his children did, by the effect of the first codicil, fall during the whole of the life of that son (from the testator's death) into the income of the general residuary personal estate, so as to increase that income for the benefit of the testator's widow, who survived that son. I consider, also, that by its effect four-ninths of the income of the 1200*l.* stock given by the will to the testator's son John George Hill and his children fell during the whole of that son's life (from the testator's death) into the income of the general residuary personal estate, so as to increase that income for the benefit of the person or persons for the time being entitled to it under the will and codicils ; and that by means of the first and second codicils the income of the residuary personal estate was during the whole of the life of the same John George Hill, after the testator's death, applicable as

(a) 1 B. & A. 137.

* under the will alone it would have been if neither that * 234 son nor the testator's daughter Elizabeth survived the testator's widow.

I am of opinion, moreover, that by force of the second codicil eighteen twenty-third parts of the income of the 1533*l.* 6*s.* 8*d.* stock given by the will to the testator's daughter Elizabeth and her children have ever since the testator's death fallen, and will until the death of that daughter fall, into the income of the general residuary personal estate, so as to increase that income for the benefit of the person or persons for the time being entitled to it under the will and codicils, and that by means likewise of the second codicil (as Elizabeth has never had and it is reasonably assumed that she will not have issue) the income of the residuary personal estate has ever since the testator's death been and will until her decease be applicable as under the will alone it would have been if she and both her brothers had died in the lifetime of the testator's widow. Beyond what I have said, I think that neither of the codicils had any effect or operation.

This view of the intricate and nearly unmanageable instruments, left by Mr. Hill to perplex his descendants and to divide the opinions of lawyers, differing somewhat from the view taken by the learned Vice-Chancellor, declarations to the effect that I have stated ought, according to my judgment, to be substituted for those contained in the decree or order of the 24th of July last. The rest of it ought, I suppose, to stand.

The costs of the appeals may, I think, be made costs in the cause, but only as the costs of a single appeal and to no greater amount.

* THE LORD JUSTICE TURNER. — In this case the Court is * 235 called on to construe a will and codicils of no ordinary difficulty. The testator had at the date of his will and at the time of his death seven children. [His Lordship stated the material parts of the will.] As if the will alone had not raised questions enough, the testator has made two codicils. [His Lordship read them.]

One question is, whether the testator has by his codicils altered the dispositions made by his will in favour of his grandchildren, or whether the issue of the three children named in the codicils are to take the same amount of capital, though their parents were to receive a less amount of income. Another question is, what

became of the difference between the incomes of the greater and the reduced stock legacies. The most important questions, however, arise on the disposition of the residue, the questions being what became of the income of the shares of the residue which is by the codicils taken away from the children named in them, and what became of the share of the income given to Anna, to whom the revocation by the codicils does not extend? These difficulties have led to the institution of the present suit, in which the Vice-Chancellor has made an order containing the following declarations: [His Lordship read them as above set out.] His Honor has therefore been of opinion that the difference of income of the legacies falls into the residue; that the codicils do not revoke the interests of the grandchildren in the capital, and that there was no survivorship as to the income of the residuary estate.

It is no wonder that on such a will and codicils different minds should come to different conclusions. My learned brother * 236 and myself have, however, without communication * with each other arrived at the same results. I regret that in some respects our conclusions differ from those of Sir RICHARD KINDERSLEY.

As to the legacies two questions arise: first, as to income; secondly, as to capital. As to the capital the question is whether there was a revocation of the interests of the grandchildren. Now the testator when he made the codicils had the will before him, for he cites part of the will: "Whereas I did in and by my said will give and bequeath unto my son John George Hill the interest of 1000*l.* in the 3*l.* per cent consols in the Bank of England, and at the death of my dear wife Hannah Hill to share with my daughter the interest of any money arising from her death as in my said will is directed for his natural life." The testator there stops in his recital with the gift to his son. Had he meant to alter the disposition in favour of his grandchildren he would have recited that disposition. He then revokes "the said legacy," by which he must mean the gifts to John George Hill which he has recited. The testator refers to the particular legatee who is tenant for life, and substitutes for the gifts to him a life-interest in another sum. We therefore agree with the Vice-Chancellor that the interests of the grandchildren are not affected.

Next, as to the difference of income of the legacies, I am not sure that on this point the conclusion to which we have come is

not the same as that of the Vice-Chancellor. The decree does not say whether this surplus income is to be treated as income or as capital of the residuary estate, and it ought to be made clear on this point. I am of opinion that the difference of income was to be treated as income of the residue. By his will the testator gave the income of a sum of stock to A. B. ; by * a * 237 codicil he reduces the sum of which A. B. is to receive the income. This converts part of the capital of the former sum of stock into a deferred legacy of stock, with no intermediate gift of the income ; that income therefore must go as income of the residue, the fund not being taken out of the general estate till the gift of the capital takes effect. In this instance the case is made more clear by the context of this particular will, by which the testator gave to his wife the dividends and interest of the moneys which he directs to be invested, "and of all other my stocks, funds, and securities, and residuary estate whatsoever."

Then comes the question as to the income of the residuary estate, which is one of much greater difficulty, and on this we differ from the Vice-Chancellor. Our opinion is that on the true construction of the will the children were to take the whole income till the death of the last surviving child. It is difficult to reason on such a will, but there are sufficient indications of intention to guide the Court in coming to a conclusion. The wording of the gift of the income of the residue shows that the testator had present to his mind the possibility of some of his children dying in the lifetime of the widow, and of their interests in the residue consequently failing, for he directs the income to go to his seven children or such of them as should be then entitled thereto. The gift is not simply to the seven children, but to such of them as should be entitled thereto. The testator could not mean by this children entitled to the income of his residuary estate ; he meant children entitled for the time being to the income of the particular legacies, and it could not be intended that he meant survivorship to take place only during the life of the widow.

* The decree was accordingly varied as follows :—

* 238

"Declare, that according to the true construction of the will and codicils of John Hill, the testator in the pleadings named, the income of the general residuary personal estate of the testator

after the death of his widow is to go to the children of the testator, and the survivors and survivor of them, until the death of the last survivor; and in what proportion among themselves until the death of the last survivor but one, their Lordships do not determine, the parties not requiring or wishing any decision on that head.

“And it appearing that only three grandchildren of the testator have been born and that they all came into existence after his decease, and that it may be reasonably assumed that not any other grandchildren of the testator will come into existence, and it appearing that of those three grandchildren one only, namely, the defendant Charles Thomas Hill, the son of John George Hill deceased, who was a son of the testator, is alive and is a minor, that another of them, namely, William Hill Brooks, the son of the testator's daughter the defendant Georgina Brooks (who is still living), died in the first year of his age in 1829, and that the third grandchild, namely, George Hill, attained his majority and afterwards died a bachelor in the year 1851, having survived his father, the said John George Hill, who died in the year 1839, declare, that according to the true construction of the will of the said testator, the said George Hill, as one of the said testator's grandsons, acquired a vested and transmissible interest in the capital, both as a specific legatee and as a residuary legatee, but that the said William Hill Brooks, the other deceased grandchild of the testator, did not acquire under the said will a vested or transmissible interest in any thing.

* 239 * “Declare, that the two codicils to the said testator's will do not nor does either of them create or cause a partial intestacy, and that the said two codicils do not nor does either of them defeat or lessen any right or interest which under the said will alone, in the absence of any codicil, the grandson now living, or any deceased grandchild of the testator, would have taken or had, at least as events have happened, but that the testator has by the said two codicils respectively dealt with only a portion of such income, as under the will, independently of the codicils, his two sons and their sister Elizabeth Hill would during their lives respectively have been entitled to.

“Declare, that one-third of the income of the legacy of 1000*l.* stock given by the will to the testator's son, John George Hill, did by the effect of the first codicil fall during the whole of the

life of that son (from the testator's death) into the income of the general residuary personal estate, so as to increase that income for the benefit of the testator's widow, who survived that son.

"Declare, that by the effect of the said first codicil, four-ninths of the income of the 1200*l.* stock given by the will to the testator's son, George John Hill, fell during the whole of that son's life (from the testator's death) into the income of the general residuary personal estate, so as to increase that income for the benefit of the person or persons for the time being entitled to it under the will and codicils, and that by means of the first and second codicils the income of the residuary personal estate of the said testator was, during the whole of the life of the said George John Hill, after the testator's death, applicable as under the will alone it would have been if neither that son nor the testator's daughter Elizabeth had survived the testator's widow.

* "Declare, that by the force of the second codicil eight- * 240
teen twenty-third parts of the income of the 1533*l.* 6*s.* 8*d.*
stock given by the will to the testator's daughter, Elizabeth Hill, and her children, has never since the testator's death fallen, and will not until the death of that daughter fall, into the income of the general residuary personal estate, so as to increase the income for the benefit of the person or persons for the time being entitled to it under the will and codicils; and that by means likewise of the second codicil, as it is reasonable to be assumed that the testator's daughter, Elizabeth Hill, will not have issue, the income of the residuary personal estate has ever since the testator's death been, and will until the decease of the said Elizabeth Hill, be applicable as under the will it would have been if she and both her brothers had died in the lifetime of the testator's widow.

"In all other respects the said order of the 24th of July last is affirmed."

In the Matter of THOMAS WADE, a Bankrupt.

1856. January 18. Before the LORDS JUSTICES.

Where a bankrupt had purchased Turkish scrip, and the transaction was carried over from time to time, and resulted in a loss of upwards of 200*l.* in one year: *Held*,—

1. That it was doubtful whether the transactions constituted gaming and wagering, or a contract for the purchase or sale of stock, within the 201st section of the Bankrupt Law Consolidation Act.
2. That a certificate might, with the consent of the assignees, and no creditor opposing, be granted for what it might be worth.
3. That such dealings were at all events improper on the part of a trader, and that the certificate ought to be suspended.

THIS was the appeal of a bankrupt from the decision of Mr. Commissioner AYRTON, refusing to grant to the appellant any certificate of conformity, on the ground that he had lost 200*l.* within one year of the filing of the petition for adjudication on contracts for the purchase and sale of stock within the 201st section of the Bankrupt Law Consolidation Act, 1849. (*a*)

On the 9th of August, 1855, the appellant filed his balance-sheet, which contained the following statement:—

“1854,— In consequence of my hearing a very favourable report of the Turkish scrip I was induced to purchase at a premium, but unfortunately it *receded in price considerably, and I was compelled to pay the difference as below :—

(*a*) Sect. 201. “That no bankrupt shall be entitled to a certificate of conformity under this Act, and any such certificate, if allowed, shall be void if such bankrupt shall have lost by any sort of gaming or wagering in one day twenty pounds, or within one year next preceding the issuing of the *fiat* or filing of the petition for adjudication of bankruptcy two hundred pounds, or if he shall within one year next preceding the issuing of the *fiat* or the filing of such petition have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract.”

"Sept. — W. F. Lockwood, Broker, London . . .	£48	15	0
Ditto, per J. B. Preston	236	4	8
Ditto, amount still owing	140	0	0
	£424 19 8"		

On the 20th of August, 1855, the appellant passed his last examination without opposition, and his application on the 6th of November for his certificate of conformity was also not opposed, but the commissioner required him to explain the above items in his balance-sheet, whereupon he made and subscribed the following declaration:—

"In the months of September and October, 1854, I purchased a quantity of Turkish scrip for the account-day in London, which would be more than a week from the day of purchase. I did not pay for such scrip, nor was such scrip delivered to me. Such scrip was sold and bought in again, and I sustained a loss thereby of upwards of 200*l*."

The commissioner held that on this declaration the certificate must be refused. (*a*)

(*a*) The commissioner in giving judgment said, that if the transaction in question had related to English stock, it would have been within the 201st section, and that the question was whether foreign scrip, not being stock, was within the clause. In the Matter of Buckland (*Fonblanque, Cases in Bankruptcy*, 250), Mr. Commissioner EVANS had decided that railway shares were not within the word "stock," but this had been overruled in *Ex parte Matheson*, 1 De G., M. & G. 448 [note (1), and cases cited], and *Ex parte Copeland*, 2 De G., M. & G. 914 [note (2), and cases cited]. In *Ex parte Buckland* it had been also decided, that dealing in foreign stock was not within section 201, on the authority of *Wells v. Porter*, 2 Bing. N. C. 722; *Oakley v. Ruby*, 2 Bing. N. C. 732; *Elsworth v. Cole*, 2 M. & W. 31, and *Robson v. Fallows*, 3 Bing. N. C. 392. These cases established that foreign stock or scrip was not within the penal Act of 7 Geo. 2, c. 8; but it did not follow that time-bargains in foreign stock or scrip were not within section 201 of the Consolidation Act. The cases relied upon by Mr. Commissioner EVANS were decided upon the ground that the 7 Geo. 2 was a penal statute, and he held that section 201 of the Consolidation Act was to be construed strictly as a penal clause, but Lord Justice KNIGHT BRUCE, in *Ex parte Matheson*, did not agree in that view. It was quite clear that foreign stock or scrip was within the mischief intended to be provided for by section 201, and it would be a reflection upon our laws, if a

* 243 * This appellant, by his petition of appeal and his affidavit in support of it, stated that the original purchase * was 3000*l.* scrip, and that 1500*l.* new scrip were granted in right of such purchase, making together 4500*l.*, and that the scrip mentioned in the account was this sum of 4500*l.* which from time to time was sold and bought in again, or continued or carried over, and that by an arrangement between the appellant and the broker the ultimate loss to be sustained by the appellant upon the purchase and sale of the scrip was fixed at 424*l.* 19*s.* 8*d.*, instead of the balance of 576*l.* 11*s.* 3*d.* appearing to be due by the account. The appellant submitted that the scrip was not government or

certificate ought to be refused for gambling in English and not for gambling in foreign stock or scrip, the offence being equal in both cases.

But even supposing that foreign stock or scrip did not fall within the latter portion of section 201, could the bankrupt escape from the previous part of clause, which spoke of "any sort of gaming or wagering"? In *Ex parte Copeland*, Lord Justice Lord CRANWORTH had said (2 De G., M. & G. 918), "Moreover, though it is unnecessary to rely upon this as a ground for the decision, I am strongly inclined to think that this transaction was a sort of gaming or wagering within the prior member of the 201st section." The learned commissioner said, that he found several eminent Judges designating time-bargains in foreign funds by the term "gambling;" thus Chief Justice DALLAS, in *Rossum v. Taylor* (Chitty's Statutes, 1022), said, "This is a case of stock-jobbing in the foreign funds, and not in our own; in my present opinion, it is not the less gambling because it is in this or that stock." In *Bryan v. Lewis* (Ryan & Moody, 386), Lord TENTERDEN, speaking of a contract to deliver goods which a man had not, and which he had not any reasonable expectation of receiving, said, "Such a contract amounts on the part of the vendor to a wager on the price of the commodity." In *Chitty on Contracts*, 2d ed. 332, n., Chief Justice DALLAS is reported to have said, that, "If two persons enter into a contract under the semblance of a sale of goods, not intending really to buy or sell the commodity, but merely as a gambling speculation, and to pay the difference of the market price on a particular day, like a time-bargain in the stocks, such a contract is illegal and void;" and in *Wells v. Porter* (2 Bing. N. C. 722), Mr. Baron PARKE used the expression, "Though I do not approve of the practice of gambling in foreign funds."

It, therefore, appeared to the commissioner, that time-bargains in foreign stock or scrip came within either the prior or the latter portion of section 101, and that the certificate must be refused. Moreover it appeared to the commissioner, that even if technically such time-bargains were not within that clause, yet that the intention of the legislature having been so clearly expressed, it would be the duty of the Court to refuse the certificate under the discretionary power of section 198. As, however, the commissioner considered there to be no moral fraud, protection was granted.

other stock within the meaning of the 201st section of the Bankrupt Law Consolidation Act, 1849, and also submitted that the transactions were not any sort of gaming or wagering within the 201st section; he deposed that when he so purchased the Turkish scrip he believed that he should make an advantageous and profitable purchase, and that he had reasonable ground so to believe, from the favourable representations made to him respecting such scrip, and that he fully believed that he should be able to pay for such scrip at the proper time, and intended so to do.

The appeal came on to be heard on the 14th of December, 1855, when it was ordered to stand over for evidence to be adduced as to the nature of the scrip.

An affidavit of Mr. George Walker, a stock-broker, was * accordingly filed, deposing that the witness was acquainted * 245 with the nature of Turkish scrip, that on the 10th of June, 1854, the Turkish Government, by a firman of the Sultan of that date, authorized the raising of a loan of five millions sterling at six per cent per annum, and that soon afterwards that government caused to be put forth on the London Stock Exchange proposals to raise in this country, through the agency of the Baron de Goldsmid and Mr. John Horsley Palmer, a loan of 8,000,000*l.* sterling, part of such 5,000,000*l.*; that the terms of such loan, as to the time of redemption and the conditions of the bonds by which it was to be secured when raised, and the security to be offered, remained undetermined for some time and until shortly before the bonds were issued, which was in 1855; that the Egyptian tribute paid to the Turkish Government was made a security for such loan by a firman dated 3d October, 1854; that any one desirous of contributing to the loan paid to the said Baron de Goldsmid and John Horsley Palmer a deposit of 15*l.* per cent upon the amount which he intended to subscribe, and received in exchange a document called a scrip certificate, indicating the amount subscribed; that this deposit had been paid and that the balance of the sum subscribed was to be paid at certain dates in the certificate mentioned; that the said certificates were commonly called "Turkish scrip" and passed by delivery, and entitled the holder on production thereof to pay the calls and to receive a bond or bonds of the Turkish Government, payable to bearer, for 1000*l.*, or other sum according to the amount of the scrip as part of the loan; that the remaining 2,000,000*l.* were raised in a similar manner, and that

until the old and new Turkish scrip were exchanged for bonds (which the witness believed did not take place till some time * 246 in 1855) the scrip was never called or known as * stock, nor was capable of any transfer or delivery except by the manual delivery of the scrip itself.

Mr. Swanston and *Mr. Bagshawe, Jr.*, in support of the appeal. The 101st section of the Act is of a penal character, and must be strictly construed. The dealings in question are not purchases or sales of stock, nor are they gaming or wagering.

[THE LORD JUSTICE KNIGHT BRUCE. — Has not Lord ELDON, in a doubtful case, where the sole question before him was as to the effect of a transaction which was the only ground of imputation upon a bankrupt, granted a certificate, leaving its validity to be disputed at law? I think that there is such a case, and that this Court has acted on the same principle.]

Mr. De Gex (*amicus curiæ*) referred to *Ex parte Kennet* (a) and to *Ex parte Mellor*. (b)

The following cases and statutes were also referred to: *Ex parte Matheson*, (c) *Ex parte Copeland*, (d) *Ex parte Buckland*, (e) *Henderson v. Bise*, (g) *Wells v. Porter*, (h) *Oakley v. Rigby*, (i) *Grizewood v. Blane*; (k) 7 Geo. 2, c. 81; 8 & 9 Vict. c. 101.

Mr. Greene, for the assignees, said that they had no hostile feeling to the bankrupt, who had commenced business at a * 247 very early age and had in every respect * conducted himself honestly and properly, with this only exception, and that they were desirous that he should have an opportunity of retrieving his position.

THE LORD JUSTICE KNIGHT BRUCE. — Taking into consideration all the circumstances, — that it is doubtful whether the case comes

(a) 1 Ves. & B. 193; 1 Rose, 331.

(b) *Post*, p. 248.

(c) 1 De G., M. & G. 448.

(d) 2 De G., M. & G. 914.

(e) 1 Fonb. Ca. in Bcy. 250.

(g) Stark. 158.

(h) 2 Bing. N. C. 722.

(i) *Ibid*. 792.

(k) 11 C. B. 526-538.

within the 201st section, that there is no opposing creditor, that there is no opposition upon the part of the assignees, and that there is no imputation against the bankrupt's conduct except that founded on these transactions, I think that a certificate may be granted, to be sustained by the bankrupt, as he best may, at law, if its validity shall be disputed. If the case is within the 201st section the order of this Court will not give validity to the certificate; if it is not, the case appears to me one in which a certificate ought to be granted. This, however, must not be treated as a precedent applicable to cases of a different description. If there had been any other imputation upon the bankrupt's conduct, or if there had been opposition, the Court might have acted differently. But I think that the certificate should be suspended until the 1st of January, 1857, and should when granted be only of the second class. I give no opinion as to its validity or probable validity.

THE LORD JUSTICE TURNER.—I also think the case one in which the bankrupt ought to have an opportunity of trying whether the transactions in question would render his certificate void at law. I think it a matter of very considerable doubt whether the case comes within the 201st section, and I give no opinion upon that point. A certificate, therefore, will be granted of the description mentioned by my learned brother.

* *Ex parte* THOMAS MELLOR.

* 248

'In the Matter of THOMAS MELLOR and SAMUEL EASON,
Bankrupts.

1855. June-4. Before the LORDS JUSTICES.

Quære, whether time-bargains in mining shares constitute gaming or wagering, or buying or selling stock within the 201st section of the Bankrupt Law Consolidation Act.

Where a bankrupt had lost more than 200*l.* in the year immediately before his bankruptcy in such transactions: *Held*, that a certificate might nevertheless be granted for what it was worth, where neither the assignees nor any creditor opposed.

THIS was the appeal of one of the bankrupts from the refusal of his certificate by Mr. Commissioner PERRY.

The bankrupts Thomas Mellor and Samuel Eason, for several years previously to July, 1854, carried on business in partnership under the style or firm of Mellor & Eason.

In April, 1854, the appellant with a Mr. Hayman purchased of various brokers in Liverpool 4000 shares in the Poltimore Copper and Gold Mining Company at North Molton in Devonshire, at 30s. per share, to be paid for at the expiration of a fortnight from the day of purchase.

The appellant in his petition of appeal and affidavit stated, that he had been induced to join Mr. Hayman in the purchase under the assurance of the latter, that he had previously to such purchase arranged with Messrs. Barnard & Co., bankers in Liverpool, to advance the whole of the purchase-money on the deposit of the certificates and on having bills drawn by Mr. Hayman and accepted by the appellant, payable at six months after date, and that the appellant had joined in the purchase with the view of retaining his proportion of the shares, and not with the view to realize a profit

by an immediate resale thereof or of any part thereof. The * 249 appellant * further stated, that when the time for payment arrived, Messrs. Barnard & Co. refused to advance the purchase-money, and that Mr. Hayman was unable to raise it from any other source than the brokers of whom the shares had been purchased. That the brokers had sold them out against the appellant and debited him with the difference arising from the purchase and resale.

Mr. Brown, one of the brokers, proved a debt against the appellant's estate for 1123*l.* 15*s.*, being the difference in price on the purchase of 1250 shares and on their subsequent sale.

The appellant passed his final examination on the 31st of January, 1855, and on an adjourned sitting for the allowance of his certificate on the second of May, the commissioner made the order under appeal, and at the request of the appellant's counsel, stated as follows his reasons in writing: —

“ In this case *Mr. Aspinall*, as counsel for Mr. Mellor, has been heard in argument on behalf of Mr. Mellor, and has contended that his client has not, according to the evidence before the Court,

brought himself within the provisions of the 201st section of the Bankrupt Law Consolidation Act, 1849.

“ It appears upon the examinations of Mr. Mellor on the 18th of October and 20th November last, and upon the balance sheet filed by him, that he engaged with another person in joint adventures in mining shares in a Devonshire copper mine, such shares being called Poltimore Mine shares. The shares were to have been paid for by the draft of the other party to the adventure upon Mr. Mellor, but when the time arrived for payment for the shares that plan was abandoned, on the ground of * some * 250 supposed difficulty in discounting such paper, and Mr. Mellor states that the shares were sold out against him and that the balance appears against him. He says also, that he advanced 115*l.* or 150*l.* on that speculation. The date of the transaction was either the latter end of April or the beginning of May, and there were about 4000 shares purchased in different lots about that period. Mr. Mellor states in his examination the names of the six brokers, his debts to whom in respect of these transactions are stated in his balance sheet, page 2, to amount to 2994*l.* 7*s.* 6*d.*, of which 1123*l.* 15*s.* is stated to be the debt due to Mr. W. A. Brown, incurred in 1854. Mr. Brown has proved his debt for 1123*l.* 15*s.*, being the difference in price of 1250 Poltimore shares purchased by Thomas Mellor from this deponent and the subsequent sale thereof at the request of the said Thomas Mellor. In page 4 of the balance sheet, Mr. Mellor claims against his co-adventurer a debt of 1572*l.* 3*s.* 9*d.* in respect of his proportion of loss on joint transactions in Poltimore Mine shares. The balance sheet refers to other small purchases of Poltimore Mine shares, which having been actually transferred are of course not within the 201st section, and refers also to joint purchases with others in respect of which no loss has been sustained by Mr. Mellor. Now such being the facts, I am of opinion: First, that the intention to pay for the shares as shown in the bankrupt's examination takes the case out of the 201st section, so far as regards the objection of loss by gaming or wagering. Secondly, that shares in the property of a company satisfy the word ‘ stock ’ in the 201st section, as appears to be the opinion of Lord CRANWORTH and also of the Lord Justice KNIGHT BRUCE in *Ex parte Copeland*; (a) opinions at vari-

(a) 2 De G., M. & G. 914; [note (2), and cases cited.]

* 251 ance with the previous decision of Mr. * Commissioner

EVANS in the case of *Ex parte Buckland*, (a) to which reference has been made in the argument before me. Thirdly, that if it be necessary that the company whose stock or shares may be in question should be a public company, there is sufficient evidence that the Poltimore Mine shares are those of a public company in the fact that 4000 of such shares have been in the market and open to purchase. Fourthly, that the shares appearing by the examination of the bankrupt not to have been actually transferred or delivered down to the date of the bankruptcy it is unnecessary to prove the specific nature of the contract. Fifthly, that the loss sustained by the bankrupt has been far greater than the 200*l.* named in the statute, and has been sustained within the period mentioned therein; and, sixthly, that it is unnecessary according to the judgment of Lord CRANWORTH in *Ex parte Copeland*, to show that there was a loss of 200*l.* by any single contract. It may be stated also, in answer to Mr. *Aspinall's* argument, that the 201st section is a penal enactment, and therefore to be construed strictly, that the Lord Justice KNIGHT BRUCE in *Ex parte Matheson* (b) says, 'I do not wish it to be understood that I agree in that view.' Upon that part of the case against Mr. Mellor which has reference to this large transaction in Poltimore Mine shares, I consider that enough has been shown to bring him within the provisions of the 201st section, and to call upon the Court to refuse his certificate, which if granted would, in my opinion, be void; and in *Wearing v. Smith*, (c) a certificate granted by the Bristol Court was successfully called in question, even upon an affidavit in answer to a rule to show cause why the defendant (the bankrupt) should

* 252 not be discharged out of custody. I have been * requested, however, to state what would have been my decision under other circumstances, and I have no hesitation in informing the parties that, as Mr. Eason appears to have been principal manager of the business concerns of the firm, it would, but for the large transactions in mine shares, have seemed to me right that a distinction should have been made in favour of Mr. Mellor in respect of the objection of reckless trading, by a suspension of his certificate for a shorter period, but that as the large speculation of Mr. Mellor in Poltimore Mine shares would at all events have called

(a) Fonb. 250. (b) 1 De G., M. & G. 450. (c) 9 Q. B. 1024.

for some censure under the 198th section, I should have suspended the certificate in his case for two years also, and should have granted only a third-class certificate."

Mr. Bacon and *Mr. De Gez*, in support of the appeal. — In the cases of *Matheson (a)* and *Copeland, (b)* referred to by the commissioner, the dealings were actually in stock in a public company. The shares here in question can in no respect be considered stock. Stock is a debt from a government or a corporate body. These shares are interests in land. *Hibblewhite v. M^r Morine (c)* decided, that even time-bargains in a commodity, of which the vendor has none at the time, do not come within the denomination of gaming or wagering. Here the vendors had the commodity which they contracted to sell. Suppose there were a contract for the purchase of land or an agreement that part of the purchase-money was to be advanced by way of mortgage, and that, owing to this promise not being performed, the vendor rescinded the contract and resold. Could that be considered gaming or wagering * on * 253 the part of the purchaser, so as to exclude him from a certificate?

The Lord Justice KNIGHT BRUCE suggested that if the assignees opposed the prayer of the petition, the matter should be argued before the full Court, as involving a question of difficulty and importance, and his Lordship inquired whether the assignees objected to a certificate being granted.

Mr. Little, for the assignees, said that they did not object.

Their Lordships thought that a certificate might be granted for what it might be worth, and granted one accordingly at the end of two years, with protection, and ordered the costs of the appellant and respondents to be paid out of the estate.

(a) 1 De G., M. & G. 448; [note (1), and cases cited.]

(b) 2 De G., M. & G. 914; [note (2), and cases cited.]

(c) 5 M. & W. 462.

* 254 * *Ex parte* DAVID TAYLOR, an Infant, by SARAH TAYLOR, his Guardian.

In the Matter of MOSES HINDLE BURROWS and GREVILLE RUDDOCK, Bankrupts.

1856. February 8, 9. Before the LORDS JUSTICES.

An infant paid, by means of borrowed money, a premium on entering into a partnership, and before he became of age disaffirmed the contract: *Held*, that he could not have recovered back the premium had his partners remained solvent,¹ and therefore could not prove for it under their bankruptcy.

THIS was an appeal from the rejection of a proof tendered on behalf of the appellant for 1500*l*.

Shortly before the 31st of July, 1854, the above-named bankrupts, who had previously been carrying on the business of worsted spinners in partnership, under the firm of Burrows & Ruddock, proposed to the appellant, who was then of the age of between nineteen and twenty years, to enter into partnership with them in the business.

Accordingly articles of partnership, dated the 31st of July, 1854, were signed by and were expressed to be made and entered into between Moses Hindle Burrows of the first part, Greville Ruddock of the second part, and the appellant of the third part. These articles were indorsed upon certain other articles of partnership, by which the business of Burrows & Ruddock had been previously regulated. They recited that by the therein within-written indenture, Burrows and Ruddock mutually agreed to become and continue partners in the trade or business of worsted spinners for the period of fourteen years from the 1st of December, 1853, upon the terms and conditions therein specified and contained, and that

Burrows and Ruddock had agreed to admit the appellant * 255 into partnership with them in the said * trade or business for the residue of the term of fourteen years upon the terms and conditions therein mentioned; and that, upon the treaty for such partnership, it was agreed that the appellant should, in manner thereafter mentioned, pay unto Burrows and Ruddock

¹ See Chitty Contr. (10th Am. ed.) 162, 173, and cases cited.

the sum of 2000*l.*; and that, in consideration of such payment, the appellant should become entitled to one-third share of the partnership capital, stock, and effects, and be admitted to a proportionate share of the profits and losses of the business. By the witnessing part it was witnessed that, in pursuance of the premises and in consideration of the sum of 1500*l.* paid by the appellant to Burrows and Ruddock on the execution thereof, and also in consideration of 500*l.* to be paid by the appellant to Burrows and Ruddock as therein mentioned (making together 2000*l.*), Burrows and Ruddock severally agreed with the appellant, his executors and administrators, that he the appellant should be admitted a partner in the trade or business of a worsted spinner, then carried on by Burrows & Ruddock at Salford, from the day of the date thereof for the residue of the term of fourteen years, determinable nevertheless as in the indenture mentioned, which trade or business should from thenceforth be carried on under the style or firm of Burrows, Ruddock, & Taylor. That the profits and losses of the partnership should be equally divided and borne by the parties thereto. That the partnership business should be carried on by them under and subject to the same terms, stipulations, provisos, declarations, and agreements, as were expressed and contained in the therein within-written articles. And it was expressed to be thereby agreed and declared that, subject to the stipulations, provisos, declarations, and agreements, contained in the therein within-written articles, the partnership estate and effects should remain and be unto Burrows, * Ruddock, and the * 256 appellant, and their respective executors, administrators, and assigns, in equal shares and proportions. The articles further witnessed that the appellant, for himself, his executors and administrators, thereby agreed with Burrows and Ruddock, their executors and administrators, that the appellant would within twelve months from the date of the now-stating articles pay to Burrows and Ruddock 500*l.*, the remaining portion of the sum 2000*l.* agreed to be brought into the business by the appellant.

Burrows and Ruddock were at the date of the articles aware that the appellant was a minor.

In accordance with the terms of the articles the appellant advanced and paid to Burrows and Ruddock 1500*l.* out of moneys advanced to the appellant from the trust estate of Samuel Taylor.

After the date of the articles of the 31st of July, 1854, the appellant devoted nearly all his time and attention to the business of the partnership, and received therefrom for his subsistence up to the 28th of July, 1855, an allowance generally paid weekly, amounting altogether to 172*l.* 6*s.* 4*d.*, but he never received any other share of the profits of the business or derived any other advantage therefrom.

Mr. Bacon and *Mr. Eddis* supported the appeal.

Mr. Swanston and *Mr. De Gez*, for the assignees.

The following cases were cited: *Ex parte Barwis*, (a) *Ex parte Watson*, (b) *Earl of Buckinghamshire v. Drury*, (c) *Stikeman v. Dawson*, (d) *Holt v. Ward*, (e) *Corpe v. Overton*, (g) *Holmes v. Blogg*, (h) *Wilson v. Kearse*, (i) *Warwick v. Bruce*, (k) *Goode v. Harrison*. (l)

THE LORD JUSTICE KNIGHT BRUCE.—In my opinion a case of fraud has not been established. That being so, the matter remains one of a contract fairly made, or as fairly made as a contract with an infant could be made—a contract upon which the infant acted during his minority, and which during the minority has been in part performed on each side. In such a state of things I conceive that if the bankrupts had continued solvent and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question or any part of it, there must have been either a nonsuit or a verdict against him. This, in my opinion, decides the question of the right of proof.

THE LORD JUSTICE TURNER.—If the decision of this case had depended on the question whether the 1500*l.* was in truth the money of the infant, I should not have thought it right to decide it without further inquiry, as I think the evidence on this point

(a) 6 Ves. 601.

(b) 16 Ves. 265.

(c) 2 Eden, 60.

(d) 1 De G. & Sm. 90.

(e) 2 Strange, 937.

(g) 10 Bing. 252.

(h) 8 Taunt. 35, 508.

(i) 2 Peake, 196.

(k) 2 Mau. & Sel. 205.

(l) 5 B. & A. 147.

very unsatisfactory. But I think it unnecessary to enter into that question, for there are, in my opinion, other sufficient grounds on which the case may be disposed of. It is clear that an infant cannot be absolutely * bound by a contract entered * 258 into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back.¹ This is laid down by Lord KENYON in *Wilson v. Kearse*, (a) and that decision has been followed in *Holmes v. Blogg* (b) and other cases. The proof in this case has been therefore properly rejected.

Ex parte SARAH ANN NORTON.

In the Matter of THOMAS SELBY and SILAS NORTON,
Bankrupts.

1856. April 12. Before the LORDS JUSTICES.

A debt secured to a testator by warrant of attorney was appropriated by his executor, with the concurrence of a legatee and her husband, in satisfaction of the former's legacy, which was of the same amount. The legatee and her husband received interest on the debt: *Held*, that this was not a reduction into possession so as to defeat the wife's equity to a settlement.²

The husband consented to a part of the debt being paid to a stranger, on having in lieu of the security of the debt to that extent a promissory note of the stranger for a like amount. *Quære*, whether this was a reduction into possession of that portion of the debt.

(a) 2 Peake, 196.

(b) 8 Taunt. 35, 508.

¹ See *Bailey v. Barnberger*, 11 B. Mon. 113; *Smith v. Evans*, 5 Humph. 70; *Cummings v. Powell*, 8 Tex. 80.

² See *Caton v. Rideout*, 1 Mac. & G. 599, n. (1), and cases cited; *Dunn v. Sargent*, 101 Mass. 336; *Chitty Contr.* (10th Am. ed.) 176, and cases in notes; *Blount v. Bestland*, 5 Ves. (Sumner's ed.) 515, and n. (a), and cases cited; 2 Kent (11th ed.), 185 *et seq.* and notes; *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396; *Holmes v. Holmes*, 28 Vt. 765; *Burr v. Sherwood*, 3 Bradf. (N. Y.) 85;

THIS was an appeal by way of motion from the decision of the commissioner on a special case.

Mr. and Mrs. Norton were married in the month of November, 1828, and she had ever since resided with and been supported by her husband. There were several children of the marriage. There was no settlement or agreement or articles of or for a settlement executed at or prior or subsequently to the marriage.

* 259 * At the date of the marriage Mr. Norton received a sum of about 1000*l.*, his wife's property, which was expended partly in the purchase of furniture. The remainder was retained by Mr. Norton, who used it in his business.

In the year 1839 a pecuniary legacy of 200*l.* was bequeathed to Mrs. Norton. The money (less legacy duty) was received by her husband and invested in the names of himself and his wife, and had since the bankruptcy been paid to his assignees. About the year 1845 Mrs. Norton's father, Mr. Bookham, died, and by his will gave to Mrs. Norton absolutely a pecuniary legacy of 300*l.*, and appointed his son executor. This 300*l.* was never actually received by Mr. and Mrs. Norton, but a debt of that amount due to the estate of Mr. Bookham, deceased, from a Mr. Sutton was, by the verbal consent of Mr. and Mrs. Norton, appropriated in satisfaction of the legacy. The whole of the debt was then and 250*l.*, part thereof, was still secured by a warrant of attorney given by Mr. Sutton to the testator Mr. Bookham to enter up judgment.

After entering into this arrangement Mr. Sutton regularly paid the interest to Mr. and Mrs. Norton. About two years prior to the bankruptcy Mr. Sutton, with the consent of the bankrupt, paid to his daughter, a Mrs. Finch, 50*l.*, part of the sum of 300*l.* secured by the warrant of attorney, and Mrs. Finch gave to the bankrupt and his wife a promissory note for 50*l.*

Mrs. Norton had no separate estate.

Mr. Norton was adjudicated bankrupt on the 16th of November, 1854, the act of bankruptcy being one committed on the 11th of November, 1854.

* 260 * The question for the decision of the Court was whether under the circumstances Mrs. Norton was entitled to any, and if any what, settlement out of the two sums of 250*l.* and 50*l.*

Corley v. Corley, 22 Geo. 178; *Machem v. Machem*, 28 Ala. 374; *Needles v. Needles*, 7 Ohio, N. S. 432; *Lockhart v. Cameron*, 29 Ala. 355; *McNeil v. Arnold*, 17 Ark. 154.

The commissioner decided that there had been a reduction into possession of the two sums, and that Mrs. Norton therefore had no equity to a settlement.

Mr. Surridge, in support of the appeal.

Mr. Martindale, for the assignees. — The husband had the complete legal title to the debt secured by the warrant of attorney and he had also the right which he exercised of taking the debt secured by the warrant of attorney in lieu of the legacy. As this was presently payable he had a right to receive it in that manner and must be considered to have so received it and to have effectually released the legacy. The assent to the appropriation must be considered equivalent to the actual receipt of the legacy. No bill could have been afterwards filed for payment of the legacy, as it would have been held completely satisfied by the appropriation. The husband therefore had, and his assignees now have, a right to use the name of the executrix to recover the debt due on the warrant of attorney, a right which is subject to no equity on the part of the appellant. But if this were not so the remedy of the assignees would be not in a Court of Equity, but in a Court of Law, which will give them leave to sue in the executor's name.

He referred to *Burnham v. Bennett*. (a)

The following authorities were also referred to before the commissioner: *In re Cutler*, (b) *In re Kincaid's * Trust*, (c) * 261 *Blount v. Bestland*, (d) *Bond v. Simmons*, (e) *Langham v. Nenny*, (g) *Harrison v. Andrews*, (h) *Carr v. Taylor*, (i) *Wilkinson v. Charlesworth*, (k) *Arundell v. Arundell*, (l) *Burrough v. Moss*. (m)

THE LORD JUSTICE KNIGHT BRUCE. — The assignees are entitled to nothing but the 50*l.* if they are entitled to that, as to which I have some doubt.

(a) 2 Coll. 254.

(b) 14 Beav. 220.

(c) 1 Drew. 326.

(d) 5 Ves. 515.

(e) 3 Atk. 20.

(g) 3 Ves. 467.

(h) 13 Sim. 595.

(i) 10 Ves. 574.

(k) 11 Jur. 644.

(l) 1 Myl. & K. 316.

(m) 10 B. & C. 558.

THE LORD JUSTICE TURNER. — I think that there was no reduction into possession, and that the appropriation of a part of the assets to answer the legacy was not sufficient to exclude the wife's equity.

It was arranged that both sums should be settled, and that the terms of the settlement should be embodied in the order.

The order was as follows : —

"This Court doth order that the order of Mr. Commissioner EVANS made in this matter on the 14th day of March, 1856, be and the same is hereby discharged; and this Court doth declare that the said Sarah Ann Norton is entitled to a settlement of the sum of 300*l.*, the amount of the legacy given to her by * 262 the will of her * late father John Bookham, deceased, in the case mentioned; and it is ordered that the securities upon which the said sum of 300*l.* is now invested be got in and received by the said John Bookham, and that the said John Bookham do stand possessed of such securities, upon trust to invest the same in his name in the purchase of 3*l.* per cent consols, and to pay the interest and dividends thereon, and also any interest which may be received on the said sum of 300*l.* or any part thereof previous to the same being got in, to the said Sarah Ann Norton for her sole use and benefit independently of her husband, the said bankrupt Silas Norton, and without being in any way subject to his debts, control, interference, or engagements; and after her decease upon trust to divide the said sum of 300*l.* equally between all the children of the said Sarah Ann Norton and the said bankrupt Silas Norton, to share and share alike, who shall attain the age of twenty-one, such share to be paid on their respectively attaining that age, with benefit of survivorship; and it is ordered that the costs of the said assignees of and occasioned by this application be paid out of the separate estate of the said bankrupt Silas Norton, such costs to be taxed by the Master of the Court of Bankruptcy; and it is lastly ordered that the sum of 20*l.* deposited in pursuance of the 29th Rule and Order made in pursuance of the Bankrupt Law Consolidation Act, 1849, be forthwith repaid to the said Sarah Ann Norton."

* *Ex parte* HENRY BATEMAN.

* 263

In the Matter of THOMAS ROUTLEDGE and JOSEPH ROUTLEDGE, Bankrupts.

1856. January 26. February 13. Before the LORDS JUSTICES.

Saw-mill proprietors employed by a timber merchant to saw timber for him agreed to keep it insured from damage by fire, and to pay him the value of it if it should be burned. A fire having taken place, the timber was burned, and its quantity and quality were not in dispute, but the price had not been agreed upon before the sawyers became bankrupt: *Held*, that the value of the timber constituted a provable debt.

THIS was an appeal from the rejection by Mr. Commissioner GOULBURN of a proof for the value of some timber belonging to the appellant, which was destroyed by an accidental fire on the premises of the bankrupts on the 16th of February, 1855. The following statement of the facts is taken from the judgment of Lord Justice TURNER.

The bankrupts were formerly the proprietors of some saw-mills, and were employed by the appellant, who was a timber merchant, to saw timber for him.

The bankrupts were thus employed by the appellant, from some time in the month of August, 1853, down to the time of the happening of the fire, and the terms on which they were so employed were thus stated in the petition:—

“It was thereupon and in the month of August, 1853, expressly agreed between your petitioner and the said bankrupts that your petitioner should send his timber to the premises of the said bankrupts for the purpose of being sawn, and that such timber should be sawn by the said bankrupts at a fixed price, and that the said bankrupts should keep so much of your petitioner’s timber as should from time to time be on their premises insured from loss or damage by fire, and should pay to your * petitioner the value of the said last-mentioned timber in * 264 case the same should be burned.”

During the period of the bankrupts being thus employed by the appellant, he from time to time sent timber to the premises of the

bankrupts for the purpose of being sawn by them, and a large quantity of the timber thus sent was remaining on the premises of the bankrupts when the fire took place. It is for the value of the timber thus destroyed, which after the bankruptcy was estimated between the bankrupts and the petitioner at 1360*l.* 4*s.* 8*d.*, that the petitioner sought to prove.

Shortly after the happening of the fire and before the bankruptcy, an account of the quantity and description of the timber belonging to the appellant which had been destroyed was made out and agreed upon between the bankrupts and the appellant, but no agreement as to the value of this timber was come to at any time before the bankruptcy, which was adjudicated on the 1st of June, 1855.

The appellant, however, before the adjudication of the bankruptcy, and on the 17th of May, 1855, commenced an action against the bankrupts to recover the value of the timber destroyed, and he proceeded in the action notwithstanding the bankruptcy. Ultimately he recovered judgment in the action against the bankrupts for 1360*l.* 4*s.* 8*d.*, the amount now sought to be proved, and which in the course of the proceedings in the action and after the bankruptcy was agreed between the petitioner and the bankrupts to be the value of the timber destroyed. The declaration in the action thus brought by the petitioner was: first, upon a promise to indemnify him from loss or damage by fire; and secondly,
 * 265 for negligence * on the part of the bankrupts in not having taken sufficient care of the timber.

Mr. Bacon and *Mr. Selwyn*, in support of the appeal. — *Woolley v. Smith* (a) was relied upon by the commissioner, but there the demand was of such a nature that the verdict of a jury was necessary to determine its amount. Here the market value of the timber was well known, as appears from the evidence, and was a certain and fixed amount. It was as certain as the value of any goods sold and delivered without an agreement as to a specified price.

They referred to *Ex parte Campbell*, (b) *Ex parte Alcock*, (c) *Re Gales*, (d) *Lane v. Burghart*. (e)

(a) 3 C. B. 610.

(c) 1 Ves. & B. 176.

(e) 1 Q. B. 933.

(b) 16 Ves. 244.

(d) De Gex, 100.

Mr. Swanston and *Mr. Bagley*, for the assignees. — The proof tendered was for unliquidated damages, and the case is like *Green v. Bicknell* (a) and the other authority to which the learned commissioner referred. The market price of timber varies according to its age and condition.

They referred to *Ex parte Todd*. (b)

Mr. Selwyn, in reply.

Judgment reserved.

February 13.

THE LORD JUSTICE KNIGHT BRUCE, — Though the order which we think it right to make on this appeal may seem to exhibit dissent on our part from * the course taken by the * 266 learned commissioner appealed from, I desire, that, so far at least as I am concerned, it may not be so understood, for I think it probable that, considering the state of the authorities and the evidence before him, I should, had I been in his place, have acted as he has done, that is to say, have declined to permit the petitioner to prove, unless under an order from the Lord Chancellor or Lords Justices, and delayed the dividend with a view to an application to this Court.

The single or main question of fact before us is as to the nature of the contract between the petitioner and the bankrupts, under which the latter received from the former the timber belonging to him, which has given rise to the controversy. It is not necessary to go through the entire terms of the agreement in every respect. But the evidence satisfies me that by and according to one of its terms the bankrupts were to become, did agree to become, and did become, insurers of the timber against loss or damage by fire while it should remain in their possession; that is to say, I consider it established that the bankrupts for valuable consideration agreed with the petitioner to make good to him any loss by fire or damage by fire which should happen of or to the timber while it should remain in the bankrupts' possession, though whether in any event to an amount exceeding the value of the timber at the time when it

(a) 8 A. & E. 701.

(b) 6 De G., M. & G. 744.

was delivered to them, may be a doubtful or an arguable question.

After the delivery of the timber, and while it was in their possession under the agreement, a fire happened, by which the timber was totally destroyed. This fire, this destruction, happened before the bankruptcy, before any act of bankruptcy, and upon the event happening the bankrupts became immediately answerable to the petitioner for the value of the timber at the time of the fire ;

* 267 * perhaps, however, limited as I have mentioned ; perhaps not limited, but subject of course to such right of set-off, if any, as the bankrupts had. And I think that when the bankruptcy happened the petitioner became entitled to prove under it the true amount of his demand in respect of the timber by reason of the fire, subject of course to any diminution to which, by set-off or through mutual credit, it might be liable.

This matter therefore ought, as I conceive, to go back to the learned commissioner with a declaration of our opinion. I must add, however, that as to the point of limitation to which I have alluded, my mind is not made up. Possibly the counsel or solicitors or the parties will settle this for themselves, otherwise a further argument may be necessary or desirable ; at least, if the question is material.

With regard to the judgment in the action against the bankrupts, no execution has, as I collect, been issued upon it, nor must any issue, and the petitioner must undertake to deal with the judgment as this Court may direct.

The Lord Justice TURNER, after stating the facts of the case, said : Two points were urged on the part of the assignees, the respondents to this petition, in support of the judgment of the learned commissioner, and in opposition to the claim of the petitioner to prove for the value of this timber. First. That the contract on the part of the bankrupts was merely a contract to insure, on which the remedy would be by an action for breach of the contract, and there would be no certain measure of the damages.

Secondly. That supposing the contract on the part of the

* 268 * bankrupts to have been to make good the value of the timber, or supposing the value of the timber to be the measure of the damages in an action for breach of the contract, the

value is so uncertain and open to dispute that no proof can be made in respect of it.

As to the first point, upon an examination of the evidence before us, I am satisfied that there was a contract on the part of the bankrupts to make good the value of this timber. It is expressly so sworn by the petitioner in his examination of the 16th of November, 1855, and I find nothing to displace this express statement in the petitioner's further examination on the 21st of November, or in his cross-examination on that day, which seems to have been carefully confined to what had passed respecting the insurance. In any event, however, it seems to be clear that there was a contract on the part of the bankrupts to insure the petitioner's timber, and that this insurance was to be made for the purpose of securing to the petitioner the value of his timber in case it should be destroyed by fire, and under such circumstances I apprehend that the value of the timber would be the measure of the damages in an action for breach of the contract. In either view of the case, therefore, I think that the first point cannot be maintained. The fact of the petitioner having sued the bankrupts as upon a contract of indemnity, and having proceeded to judgment in the action notwithstanding the bankruptcy, cannot, in my opinion, weigh against the evidence before us.

In my view of the case, therefore, the question of proof depends wholly upon the second point. The respondent's argument upon this point was based upon the cases of *Green v. Bicknell* (a) and *Woolley v. *Smith* (b), but upon looking into those * 269 cases I think they by no means govern the present. In

Woolley v. Smith, the contract as construed by the Court was in part merely to enable the plaintiff to earn freight, for which the remedy would be in damages and to which there might be a set-off, and in *Green v. Bicknell* (a) in the view taken by the Court, all the questions of quantity, quality, customary allowance, and market price were entirely open, those several ingredients having been found by the special case merely as facts, and not as facts agreed on before the bankruptcy. In each of those cases, therefore, there were other matters open to dispute besides the mere question of value, but in the present case I can see nothing that can be open to dispute except the mere question of value; and it is, I think,

(a) 8 A. & E. 701.

(b) 3 Com. B. 610.

sufficiently proved that there is a market price governing the value of timber.

It was suggested, indeed, that the value of timber would depend upon its age, but the answer to this argument is, that the evidence shows that the value increases with the age. Again, it was suggested that some part of the timber might have been already sawn, but the same answer applies to this argument also. The value would have been increased by the timber being sawn. Besides, there will, as it seems to me, be an end to all proofs in bankruptcy for goods sold and delivered, and for work and labour done, if mere suggestions of this description, unaccompanied by proof, are to be attended to, an observation which applies equally to another suggestion pointed at by the cross-examination, and also raised in argument, that some of the timber might be unsound.

Seeing, then, that the quantity and quality of this timber
* 270 * was settled before the bankruptcy, that the value of it only remained to be determined, and that the value of timber is regulated by the market price, my opinion is, that assuming the petitioner to be content to prove for the market value of this timber, his proof ought to be admitted. I believe that if we were to hold the contrary we should be carrying the law much beyond the decided cases, and be straining it most prejudicially, both to bankrupts and to the just administration of their estates.

I have arrived at this conclusion the more readily, as I observe from the judgment of the learned commissioner, that he was desirous if possible to admit this proof, and I may add, that, looking at what has been said in some of the cases, I am by no means sure that in his position I should have acted otherwise than he has done. With reference to the observations which he has made on *Utterson v. Vernon*, (a) I think that if the law be as I have taken it to be, the petitioner might well swear that the bankrupts were indebted to him at the time of the bankruptcy in the value of the timber in question.

(a) 3 T. R. 539.

* *Ex parte* JULIA ROGERS.

* 271

In the Matter of THOMAS SELBY and SILAS NORTON,
Bankrupts.

1856. April 21. Before the LORDS JUSTICES.

A mortgaged estate was sold with the concurrence of the mortgagees, free from the mortgage; and a part of the purchase-money was invested as an indemnity to the purchaser against some possible charges, and subject thereto in trust to secure a portion of the debt which had been secured by the mortgage. Afterwards the mortgagees, who were solicitors, borrowed money of a client, giving her a memorandum purporting to charge the mortgage debt (which they described as still secured on the property) with the money thus borrowed. On the solicitors becoming bankrupt,
Held, —

1. That the memorandum created a charge upon the solicitors' interest in the indemnity fund.
2. That as one of the solicitors was one of the trustees of the fund, the notice which he had of the charge was sufficient to take it out of their order and disposition.¹

THIS was an appeal by way of motion from the decision of Mr. Commissioner EVANS upon a special case, which stated in substance as follows: —

Miss Julia Rogers, of Ash, in the county of Kent, was a client of the bankrupts' late firm of Selby & Norton.

On the 20th of May, 1843, the firm of Selby & Norton received from Miss Rogers a sum of 567*l.* 13*s.* 6*d.*, and on the 20th of July, 1843, they received from her a further sum of 280*l.* 6*s.* 6*d.*

On the 21st of July, 1843, Messrs. Selby, Norton, & Selby, the then firm, wrote Miss Rogers the following letter: —

“Town Malling, July 21, 1843.

“Miss Julia Rogers, Ash, Kent.

“Dear Madam, — We hold in our hands a mortgage from Mr. Brownlow to us, dated the 4th of February, 1843, of estates at East Malling, for 848*l.* Having received the sum of 848*l.* from you we acknowledge that * we hold the mortgage and * 272 the documents of title on your behalf, and that for the said

¹ Lewin Trusts (5th Eng. ed.), 503; Sugden V. & P. (14th Eng. ed.) 379.

sum of 848*l.* we are trustees to you, and we engage (in consideration of the payment to us by you as above) to repay you the said principal sum and interest at 5*l.* per cent thereon, or such part or parts thereof respectively as the said Thomas Browning shall not repay you.

“ We are, dear madam, yours faithfully,

“ SELBY, NORTON, & SELBY.”

The deeds were handed over to Miss Rogers, but there was no conveyance of the legal estate or assignment of the mortgage debt to her.

In the month of September, 1844, Thomas Browning, the mortgagor of the property referred to in the letter of the 21st of July, 1843, sold it, and on the 20th of September, 1844, Messrs. Selby & Norton wrote to Miss Rogers as follows :—

“ Miss Julia Rogers, Ash, Kent.

“ Dear Madam,— Mr. Browning’s estate, on which your 848*l.* mortgage money is invested, has been sold, and in the course of the ensuing week that money will be paid into our hands with the interest which will be then due. We hold a mortgage of our own for 600*l.* at 5*l.* per cent interest from two gentlemen of the name of Marchant, which we shall be happy to let you have as an investment for part of the money. Please let us hear from you on the subject, and if you approve of the security of Messrs. Marchant we shall be glad to be instructed as to the application of the balance.

“ Dear madam, faithfully yours,

“ SELBY & NORTON.

“ Town Malling, September 20, 1844.”

* 273 * Miss Rogers returned to Messrs. Selby & Norton

Browning’s deeds deposited with her, and between the date of the above letter and the 7th of October, 1844, the purchase of a portion of Browning’s property was completed, and Messrs. Selby & Norton received 289*l.*, part of the purchase-money. In their cash-book, under the date of the 7th of October, 1844, there was the following entry: “ N.B. We this day gave Miss Julia Rogers a letter acknowledging that for the cash received of Browning we held so much of Marchants’ 600*l.* mortgage on her account ”

The following is a copy of the letter referred to : —

“ Miss Julia Rogers, Ash, Kent.

“ Dear Madam, — With reference to our former letter to you dated the 21st of July, 1843, we beg to inform you that Mr. Browning has sold one of the estates whereon was secured the 848*l.* therein referred to, and reduced the sum to 559*l.* by the payment to us on account of 289*l.* Mr. Browning has also cleared all interest on the said sum of 848*l.* to the 30th of September. As you are desirous that we should hold the said sum of 289*l.* at interest at 5*l.* per cent we shall be happy to do so, and as a security for the same we hereby charge a mortgage to us for 600*l.* due to us from Messrs. Marchant of their shares in several estates in the county of Kent and elsewhere in the kingdom of England.

“ We are, dear madam, yours faithfully,

“ SELBY & NORTON.

“ Town Malling, October 7, 1844.”

Subsequently Messrs. Selby & Norton received the balance of the mortgage money from Mr. Browning, but did not pay it over to Miss Rogers.

From the year 1844, down to the 10th of October, * 1854, * 274 Messrs. Selby & Norton regularly paid interest to Miss Rogers for the 289*l.*, and the mode in which the payment of interest was entered in Messrs. Selby & Norton's books was as follows : —

“ Miss Rogers. — Half-a-year's interest on 289*l.*,

part of Marchants' security due to her	£7	4	6
Less tax	0	4	2
	£7	0	4”

The facts as to the mortgage from Messrs. Marchant were as follows: By deeds of the 10th and 11th of February, 1841, Messrs. Thomas and William Marchant executed to the late firm of Selby, Norton, & Selby a mortgage of shares in the Oxford Castle Farm for securing a debt due from Messrs. Marchant to Messrs. Selby, Norton, & Selby of 600*l.* In 1844 Lord Amherst purchased the farm for 14,500*l.*, and Messrs. Selby & Norton

joined in the conveyance, which was dated the 11th of July, 1844. From that period Messrs. Selby & Norton had no interest whatever in the farm. They did not in fact receive the amount of their mortgage money, but that and other sums were invested in the purchase of 1079*l.* 9*s.* 5*d.* consols, in the names of Robert Carr Foster, Edward Duke, and the bankrupt Thomas Selby, subject to a declaration of trust dated the 27th of July, 1844, whereby it was declared that for fourteen years from the 20th of July, 1844, the 1079*l.* 9*s.* 8*d.* consols should be retained for the purpose of indemnifying Earl Amherst against some possible claims on the part of the heirs of a former owner of property, and subject thereto as to one moiety of the investment in trust, to pay the capital to the bankrupts, their executors, administrators, or assigns, under or by virtue of and upon the trusts of the indenture * 275 of the 11th of February, 1841, or in case * the moneys secured by that deed should have been previously satisfied and discharged, then to the mortgagors, their executors, administrators, and assigns.

The bankrupts received the dividends on a moiety of the stock down to the period of their bankruptcy. No notice was given by Miss Rogers to the trustees of the indemnity fund of any charge upon it.

The question for the opinion of the Court was, whether the letters referred to in the case or any or either of them gave Miss Rogers any lien or charge on the moiety of the 1079*l.* 9*s.* 5*d.* 3*l.* per cent consols payable to Messrs. Selby & Norton under the trusts of the deed of the 27th of July, 1844.

The commissioner held that the letters of 1844 gave Miss Rogers no lien, there having been at the time when they were written no mortgage to the firm from the bankrupts of their shares in the estate in Kent.

From this decision Miss Rogers appealed.

Mr. Surrage supported the appeal.

Mr. Martindale, for the respondents. — There was no intention of charging the interest of the bankrupts in the stock. The letter on which the appellant founds her claim designates no property belonging to the bankrupts, and consequently it created no charge in priority to their general creditors. Moreover, as no notice was

given to the trustees of the fund, the bankrupts' interest in it remained in their order and disposition with the consent of the true owners.

Mr. Surrage was not called on to reply.

* THE LORD JUSTICE TURNER. — The security is, by the * 276 letter of the 7th of October, 1844, described as being on a mortgage for 600*l.* from Messrs. Marchant of their shares in several estates in the county of Kent and elsewhere in the kingdom of England. Now, there had been a mortgage to which Messrs. Selby & Norton were entitled on estates which had been sold, and a portion of the purchase-money was invested for the purposes of indemnifying the purchaser. There was no mortgage to satisfy the description in the letter except Messrs. Selby & Norton's charge on this indemnity fund, and the question is, whether the letter gave a security on this charge. What were the equities between the parties at the time of the bankruptcy? Had or had not Miss Rogers a right to have the representations held out to her by Messrs. Norton made effectual so far as they had the means of so doing? They had represented to her that the sum was secured on mortgage, and it cannot, I think, be doubted that if a bill had been filed by her stating that this representation was not correct because the charge had been converted into one upon a sum of stock she would have been held to have a right in equity to have her security perfected as against the persons who made that representation.

Upon the question of order and disposition I think that, as Thomas Selby, who was one of the trustees of the sum of stock, had notice of the security, that was sufficient to take the fund out of the order and disposition of the bankrupts and that the mortgage must therefore prevail.

The Lord Justice KNIGHT BRUCE concurred.

* 277 * *Ex parte* FREDERICK CRABB and THOMAS SIMPSON.

In the Matter of WILLIAM PALMER, against whom a Petition for Adjudication of Bankruptcy was filed.

1856. February 22. March 14, 17. April 12, 28. Before the LORDS JUSTICES. April 26. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The Court has jurisdiction on an appeal from a refusal to adjudicate to remit the matter back to the commissioner, with a declaration that, in the opinion of the Court, the evidence is sufficient to support an adjudication.

A trader was taken in execution under a *ca. sa.*, and while in the custody of the sheriff's officer was taken under a warrant on a charge of felony. He remained in the county gaol under the writ and warrant for more than twenty-one days: *Held*, that this was a sufficient lying in prison to constitute an act of bankruptcy.

A surgeon, who was also licensed to practise as an apothecary, supplied medicines to his patients, but not to other persons: *Held*, that he was liable to become bankrupt as an apothecary.

THIS was a petition by way of appeal from the decision of Mr. Commissioner BALGUY, holding that the respondent William Palmer had not committed an act of bankruptcy, and consequently refusing to make an order of adjudication of bankruptcy on a petition filed by the appellants seeking such an adjudication.

The act relied upon as an act of bankruptcy was proved by the deposition of Mr. William Fulford, who deposed that he was governor of Stafford Gaol, and that he in that capacity received the respondent into his custody at the gaol under a warrant upon a *capias ad satisfaciendum* at the suit of Henry Padwick, and also under a coroner's warrant on a charge of murder, on the 17th of December, 1855. That the respondent had ever since remained in the gaol in custody of the deponent under both the warrants. That the respondent, on his committal to the gaol, was immediately passed to the criminal side of the prison, and there remained, and that the *capias* was not discharged.

* 278 There was also the deposition of William Goodson * Ponder, the assistant of a sheriff's officer, to the effect that on the 13th of December, 1855, the witness arrested the respondent under a writ of *capias* at the suit of Henry Padwick, at the house

of the respondent at Rugeley, and remained with him there until the 17th of the same December, during the whole of which time the respondent remained in his custody under the said writ. That on the 17th of December the respondent was removed under the writ and a coroner's warrant for wilful murder to the gaol of the county of Stafford; the coroner's warrant having issued after the respondent was taken upon the *capias*. It appeared that the delay in the removal of the respondent to gaol was occasioned by the state of his health.

The commissioner made the following minute of the grounds of his decision: "I think that there is not a good act of bankruptcy, being of opinion that the lying in prison (a) was under criminal as well as civil process; but I find that there is sufficient evidence of an act of trading." The petition of appeal prayed that the decision of the commissioner might be reversed, and that an adjudication of bankruptcy might be made.

* In opposition to that part of the decision of the com- * 279
missioner which found the trading sufficient, the respondent deposed that he carried on the business of a surgeon at Rugeley, and only supplied medicines to his patients in the exercise of his profession and in subservience to the exercise in it of his skill and ability; that he had never sold any drugs or articles out of his surgery to any person except as before mentioned, and had then only done so on his own prescribing; and that he never had sold any drugs or medicines, or compounded any medicines, except as ancillary to his profession of a surgeon. There was, however, evidence that the respondent had taken out a certificate from Apothecaries' Hall, by virtue of which he held the rank of a licentiate, and was authorized to practise in that capacity.

(a) The 69th section of the Bankrupt Law Consolidation Act is as follows: "That if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall thereby be deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention."

March 14, 17.

Mr. Archibald Smith, in support of the appeal.

Mr. De Gex, for the respondent.

Their Lordships considered that the question of the jurisdiction of the Court of appeal to reverse a refusal of the commissioner to adjudicate was of sufficient importance to be heard before the full Court, and the case was adjourned to be so heard if the Lord Chancellor should think fit.

April 26. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

Mr. Daniel and *Mr. Archibald Smith*, in support of the appeal. — The 12th section of the Bankrupt Law Consolidation Act enacts, that the Court of Bankruptcy shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter * of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to acts done, or sought to be done, by the assignees in their character of assignees by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the Court, and also in any application for a certificate of conformity and in any other matter (whether in bankruptcy or not) where the Court, by virtue of the Act, has jurisdiction over the subject of the petition or application, and subject in all cases to an appeal. These words are perfectly general, and extend to an appeal from a refusal to adjudicate.

Mr. De Gex, for the respondent. — Before the passing of the present Act the Court of review had no power to order a commissioner to adjudicate, and if he refused there was no appeal from his decision; *Ex parte Perrin*, (a) *Ex parte Stead*, (b) *Ex parte Nicholls*, (c) *Ex*

(a) Buck. 510.

(b) 1 G. & J. 301.

(c) 2 G. & J. 266.

parte Johnston, (a) *Ex parte Brown*, (b) *Ex parte Nicholson*, (c) *Ex parte Hind*. (d) The question therefore is, whether the present Act was intended to alter this state of the law. Now the provisions respecting adjudication of bankruptcy are found all together in the same part of the Act, and they are wholly silent as to any right of appeal. As to the provisions of the 12th section, the right of appeal given by *them is only co-extensive *281 with the original jurisdiction which they confer. Now the original jurisdiction to adjudicate is given, not by this section, but by the 101st. The only words in the 12th section which can be supposed to give the jurisdiction are "superintendence and control," which are the same as those in the 1 & 2 Will. 4, c. 56, § 2, from which they are copied, and therefore if they were sufficient to give the jurisdiction to adjudicate, the Court of review would have had that jurisdiction. It was, however, settled by the cases, already referred to, of *Ex parte Johnston*, *Ex parte Brown*, *Ex parte Nicholson*, *Ex parte Hind*, that the Court of review had no such jurisdiction. It follows from this, and more particularly from the introduction of the special provision of the 101st section, that the power of the commissioners to adjudicate a person bankrupt does not arise under the 12th section, but under the 101st, and therefore that the right of appeal, which arises under the 12th section and is co-extensive only with the original jurisdiction given by it, does not extend to a refusal to adjudicate. This view is confirmed by the provisions of the Act as to the certificate of conformity. The jurisdiction to grant a certificate of conformity was first given by the 4 & 5 Anne, c. 17, § 19. But the Lord Chancellor had no jurisdiction to reverse a refusal of a certificate. *Ex parte King*. (e) The 5 & 6 Vict. c. 122, made the granting or refusal of the certificate a judicial act. But the general clause in the Court of Review Act (1 & 2 Will. 4, c. 56, § 2), in conjunction with the provisions of the 5 & 6 Vict. c. 122, were not held sufficient to give the Court of review jurisdiction to reverse a refusal of a certificate. Therefore in the 12th section of the present Act the original jurisdiction to grant a certificate is expressly mentioned, and in the 206th and 207th sections the

(a) 2 Mont. & Ayr. 390.

(d) De Gex, 161.

(b) 2 Mont., Dea. & De G. 758.

(e) 15 Ves. 127.

(c) 3 Mont., Dea. & De G. 295.

refusal is expressly made the subject of appeal. The
 * 282 * omission of all mention of adjudication of bankruptcy in the 12th clause, and of all reference in the special clauses as to adjudication, to an appeal from a refusal to adjudicate, while an appeal from the refusal of a certificate is carefully provided for, affords conclusive evidence that the refusal to adjudicate was not meant to be the subject of appeal.

The Lord Chancellor having left the Court before the argument for the respondent was quite concluded, —

The Lord Justice KNIGHT BRUCE at the conclusion of the argument said: The Lord Chancellor has authorized us to say, that his impression on leaving the Court — an impression of course liable to be removed by the arguments of counsel — was, that the hearing on the merits should be proceeded with. The Lord Justice TURNER and myself also are of that opinion, and the case will be set down and proceeded with before the Lords Justices.

The Lord Justice TURNER concurred.

April 28. Before the LORDS JUSTICES.

Mr. Daniel and *Mr. Archibald Smith*, in support of the appeal. — They contended that there had been a sufficient lying in prison to constitute an act of bankruptcy, and that the respondent having obtained a license to practise as an apothecary was within the very terms of the Act.

Mr. De Gex, for the respondent. — In the first place the petitioning creditor's debt is invalid, for payment of it in full has been tendered and refused.

* 283 * In the next place, the lying in prison is not an act of bankruptcy, since the respondent could not, by paying the debt, have obtained his liberty, being in custody on a capital charge. The act of lying in prison was only an act of bankruptcy as being a test of insolvency, which fails to apply to a case where payment of the debt would not put an end to the imprisonment. In the case of *Rose v. Green*, (a) Lord MANSFIELD observed, that

(a) 1 Burr. 437.

where positive laws fixed and described what should be looked upon as acts of bankruptcy, they ought to be construed according to their intention, and that the mere being arrested was no presumption of insolvency, but that presumption from lying in prison two months without being able to get bail was a very strong one. In the case of *Cobb v. Simmonds*, (a) Lord Chief Justice ABBOTT held, that lying in prison two months for non-payment of a penalty was an act of bankruptcy only because the penalty was a debt. Mr. Justice HOLROYD concurred, and said it was equally a proof of insolvency when a person remained in prison whether he was unable to pay a penalty or a debt. The result is, that lying in prison to be an act of bankruptcy must take place under circumstances rendering it a proof of insolvency. In *Ex parte Bowes*, (b) which turned on the construction of the Statute 21 Jac. 1, c. 19, § 2, expressed in nearly the same words as the 69th section of the present Act, it appeared that in 1787, the petitioner had been committed to the King's Bench Prison for an offence, and had been since that time charged with several actions. On the 26th of November, 1787, he was surrendered in discharge of his bail, and Lord ROSSLYN said: "The ground of an act of bankruptcy by lying two months in prison evidently is, that if a man has * not credit enough to procure bail and deliver himself from * 284 that arrest, that is a good ground to hold that he is totally insolvent, and therefore an object of the bankrupt laws. But upon the commitment under a criminal process he cannot get out. It is perfectly new to found a commission upon a lying in prison upon a commitment for a crime."

[THE LORD JUSTICE KNIGHT BRUCE. — May not a Judge admit to bail in the case of a charge of felony? In *Ex parte Bowes*, the commitment was, I believe, under sentence, and not as here for safe custody until trial.]

The words occurring in the 69th section of the present Act and not in the 21 Jac. 1, were introduced to provide for the case of an imprisonment originally on a criminal charge, and a detainer for debt. In *Rex v. Page*, (c) which was the case of an indictment for not answering, one of the questions was, whether there was a

(a) 5 B. & A. 516.

(b) 4 Ves. 168.

(c) 1 Brod. & Bing. 308.

valid act of bankruptcy. At the trial before Mr. Justice BEST at the Old Bailey, the distinction was taken between the case and *Ex parte Bowes*. The act of bankruptcy in *Rex v. Page* was lying in prison where the prisoner was detained by virtue of a former warrant of commitment for not answering under a commission which had been superseded, and also for debt, and the learned Judge upon the trial expressed his opinion that, as the prisoner could at any time get rid of the warrant of commitment by submitting to be examined, it was not like the case of *Bowes*, where the prisoner was detained under a judgment for a crime of which he had been convicted, and the Judges unanimously held this ruling to be correct.

Lastly, as to the question of trading, the case is like the case of a market-gardener, a cow-keeper, or a brick-maker, where * 285 the market-gardening, cow-keeping, or * brick-making is only incidental to a pursuit which is not trading. In *Ex parte Dering*, (a) a farmer in the Isle of Thanet kept five cows, and it was held that his selling the milk to a retail dealer did not render him subject to the bankrupt law as a cow-keeper. So in *Bell v. Young*, (b) where a farmer kept cows for the purposes of the farm, but realized some money from the surplus milk, Lord Chief Justice JERVIS said, though the man was a cow-keeper inasmuch as he kept cows, yet he was not one within the meaning of the Bankrupt Act, because he kept them for the purposes of his farm. In the present case the respondent only supplied medicine upon his own prescriptions and incidentally to his profession of a surgeon. He merely obtained a certificate from the Apothecaries' Company, in order to avoid any question as to a liability to penalty for supplying drugs without such a qualification.

The Lord Justice KNIGHT BRUCE said, the Court was desirous to hear the other side upon the question of the act of bankruptcy, and not with regard to the rest of the commissioner's order.

Mr. Daniel.—The *dicta* in *Rose v. Green* and *Cobb v. Simmonds* do not affect the present case. The words of the section of the present Act are different from those of the section under which *Ex parte Bowes* was decided, and the alteration is such as

(a) De Gex, 398.

(b) 15 C. B. 524.

to show that a case like the present is within the intention of the Act, for it is clear that if the *capias* had been issued on the 18th there would have been an act of bankruptcy, and it would be strange if the legislature intended the case to be taken out of the Act by the *capias* issuing earlier. In *Ex parte Bowes*, the * lying in prison was under a criminal charge, and the * 286 words of the enactment of James I. did not in terms apply. The words of the present enactment are wide enough to reach the case. *Stevens v. Jackson* (a) has decided that the detention of the respondent in his own house was a lying in prison for the purpose of constituting an act of bankruptcy.

THE LORD JUSTICE KNIGHT BRUCE. — The first question raised upon this petition seemed to the Court to be one of some nicety as well as of general importance and interest; namely, whether when a commissioner has declined to adjudicate it is competent to the petitioning creditor to bring the matter before the Court of appeal to have it decided whether there was a case or no case for an adjudication. We desired that this point should be argued before the full Court, and with the Lord Chancellor's permission it has there been argued. The Lord Chancellor was unable to hear the whole of the argument, but his impression was, that supposing the merits of the case to be with the appellants or as the appellants state them to be, the Court of appeal, according to the construction of the Bankrupt Law Consolidation Act, has jurisdiction for the purpose of making such an order as will presently be mentioned. Of course that impression upon the mind of the Lord Chancellor might possibly have been changed if he had heard the whole of the argument. My learned brother and myself, however, have heard the whole of the argument, and we have come to the conclusion that, according to a just exposition of the Act of Parliament and particularly of the sections which have been the subject of comment, there is a jurisdiction in the Court of appeal * to * 287 declare an opinion as to the effect of the evidence as warranting or not warranting the commissioner in making an adjudication, and with that declaration to remit the matter to the commissioner.

With respect to the merits there has been no dispute before the

(a) 6 Taunt. 106.

commissioner as to the petitioning creditor's debt nor has there been here, except as to the effect of the tender which has been made. This tender, though not made by the alleged bankrupt, was made by a person whose liability for the bankrupt entitled him to make it, but it not only had not been made when the case came before the commissioner, but it was not made until after the presentation of the petition of appeal. Whatever therefore may be the effect or absence of effect belonging to that circumstance in another stage of the proceedings and on another application, as to which I say nothing, it cannot be of any avail as a ground of objection upon the present occasion or stand in the way of the exercise by the learned commissioner of his functions on the question, whether there ought to be an adjudication.

On the question of trading, the learned commissioner was, as we understand, satisfied, and we are of opinion that he was rightly satisfied, for in our judgment the evidence showed distinctly that the alleged bankrupt practised as an apothecary, and was an apothecary within the meaning of that term as used in the Bankrupt Law Consolidation Act.

There remains the question whether an act of bankruptcy has been committed. The respondent was taken in execution upon a judgment debt at a time when he was supposed to be in a state of health making it unfit to remove him from his home to the
 * 288 county gaol. But * nevertheless, he remained under arrest in his own house (which for this purpose was tantamount to a prison) in the custody of the sheriff's officer, who had him there until he was given into the more direct custody of the sheriff in the county gaol. Before his removal he was arrested under a coroner's warrant on a charge of felony, and when considered fit to be removed he was removed by virtue of the arrest under the *capias* and also under the warrant on the charge of felony, and under both he was sent to the gaol, and under both commitments he remained there for twenty-one days, not merely from the time of his first arrest, but from the time of his actual reception in the gaol. That in my opinion is a case within the spirit and meaning, if not also within the letter, of the 69th section.

The rule "*leges ex mente intelligendæ*" is a good rule, and it would be construing this section against the plain intention and in a way which the letter does not require, to hold that this is a case not within the Act. It is plain that a release on bail upon the

criminal charge would not have discharged the prisoner from his arrest for the debt, and as plain that a release from his imprisonment under the *capias* would not have discharged him from the coroner's warrant.

I am not surprised that the commissioner considered this a fit case to be mentioned here, but our opinion is that, although during the twenty-one days the prisoner was confined under two causes of imprisonment, this was an imprisonment under a civil arrest within the meaning of the 69th section. The case must be remitted to the learned commissioner with a declaration that on the evidence there is, in our opinion, ground for adjudging Mr. Palmer a bankrupt.

* THE LORD JUSTICE TURNER. — I am of the same opinion * 289 on all these points. As to the jurisdiction of the Court of appeal, the 12th section provides: [His Lordship here read the 12th section.] The words here are general and unlimited. A restrictive context is required before they can be cut down so as to exclude the jurisdiction of the Court of appeal in a case like the present, and the Act supplies no such context.

As to the trading the evidence is conclusive.

On the subject of the act of bankruptcy it is clear that there has been a lying in prison for twenty-one days after the arrest. The language of the Act is: "If any such trader, having been arrested or committed to prison for debt or on any attachment for non-payment of money, shall upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days." Now, although the alleged bankrupt here was in prison under a criminal process, he was not the less so under a civil process, and he therefore comes within the words of the first branch of the section. Is it then within their intent and spirit? How the case might have stood if these words had stood alone it is not necessary to say, and I should have felt some doubt, having regard to the authority of *Ex parte Bowes*. But the legislature has said, "or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged," so that if a person, being already in prison under a criminal process, is detained under a civil

process, it is clear that his lying in gaol under the civil process, though after the criminal process, is an act of bankruptcy. And when the legislature has said that a person committed on a
* 290 * criminal charge and detained for debt is within the Act, I cannot understand the Act as not applying to a case where, being in prison on a civil process, he is detained on a criminal charge. I am therefore of opinion that there has been a good act of bankruptcy. The case will be remitted to the commissioner as my learned brother has stated.

The following was the form of the order : —

“ This Court doth declare, that, in the opinion of this Court upon the evidence adduced before it, there is ground for adjudicating the said William Palmer a bankrupt under the petition presented to the Court of Bankruptcy for the Birmingham district on the 28th day of January, 1856 ; and with this declaration this Court doth refer the matter back to the said commissioner. And in case the said commissioner shall adjudicate, then it is ordered, that the costs of the said William Palmer, not exceeding the sum of 5*l.*, and the costs of the said petitioners of and occasioned by this application, be paid out of the estate of the said William Palmer, such costs to be taxed by the registrar of the Court of Bankruptcy for the Birmingham district acting in the Court of the said commissioner. And in case the said commissioner shall decline to adjudicate, then this Court doth reserve the consideration of the costs above mentioned. And it is lastly ordered, that the sum of 10*l.* deposited in pursuance of the 29th Rule and Order made in pursuance of the Bankrupt Law Consolidation Act, 1849, be forthwith repaid to the said petitioners, or Mr. Henry Francis Church, their solicitor.”

[226]

* *Ex parte* JAMES LYON GEAVES and EDMUND * 291
WILLIAM PAUL.

In the Matter of WILLIAM STRAHAN, SIR JOHN DEAN
PAUL, and ROBERT MAKIN BATES, Bankrupts.

1856. April 12, 25, 28. May 3. Before the LORDS JUSTICES.

Trustees of a settlement only authorizing investments in government or real securities, advanced part of the trust moneys to a banking firm, in which one of the trustees was a partner, on the security of a mortgage of bonds in which some of the bankers were obligees. Afterwards another partner in the bank was appointed a new trustee of the settlement. The trust moneys were not called in. On the bankers becoming bankrupt, *held*, that there was a breach of trust on the part of the new trustee, constituting a provable debt against his separate estate.¹

Other part of the trust moneys was paid with other moneys indiscriminately into the bank of the firm, to the private account of one of the partners, and an amount equal to the interest on these trust moneys, was credited regularly by his direction to one of the persons interested under the settlement, but no other circumstance was in evidence to affect the other partners with notice that the money thus paid in was subject to the trusts: *Held*, that the payment of interest was not sufficient for that purpose, and that the money paid in did not constitute a provable debt against the separate estates of the other partners.

The new trustee did not inquire whether the old trustees had received further trust moneys under a covenant in the settlement to settle future property: *Held*, that this was not sufficient ground for charging him for wilful default in respect of sums which ought to have been got in by the old trustees, or in respect of sums received by the covenantor after the appointment of the new trustee and not settled, there having been nothing to lead to a suspicion that any default had been made by the old trustees or the covenantor in those respects.

The bonds were left in the custody of the bankers, and no notice of the mortgage was given to any of the obligors. One of the partners and trustees of the settlement was the sole surviving obligee in one of the bonds: *Held*, that he was the real and not merely the reputed owner of the bond debt, but that he held it in trust, and that it was not in the reputed ownership of the firm or of himself.²

Others of the bonds had, without the knowledge of the *cestuis que trust*, been paid off and replaced by different securities, which the bankers had set apart and marked with the names of the trustees of the settlement: *Held*, that these securities were not in the reputed ownership of the bankers.

¹ See Lewin Trusts (5th Eng. ed.), 171.

² See Lewin Trusts (5th Eng. ed.), 196.

THIS was an appeal from the decision of the commissioner, refusing to admit a proof tendered by the appellants against the separate estate of William Strahan, one of the above-named bankrupts, in respect of the misapplication of certain funds subject to the trusts of a settlement of which the appellants had been lately appointed new trustees.

- * 292 * The settlement was made in contemplation of the marriage of Edward Fox Fitzgerald with Jane Paul, sister of Sir John Dean Paul, one of the bankrupts. It was dated the 2d of November, 1827, and made between Edward Fox Fitzgerald of the first part, Sir John Dean Paul (the father of the bankrupt, Sir John Dean Paul), and Dame Frances, his wife of the second part, Jane Paul of the third part, and Lord Alvanley and the bankrupt Sir John Dean Paul, then John Dean Paul, Esq., of the fourth part. It recited amongst other things that Jane Paul might possibly become entitled to a distributive share of the personal estate of Ann Simpson as one of her next of kin (and which contingency subsequently happened). By the witnessing part of the deed Mr. Fitzgerald covenanted with the trustees, Lord Alvanley and Sir John Dean Paul the father, their executors, administrators, and assigns, that in case the intended marriage should take effect, and by means of the death of Dame Frances Eleanor Paul in the lifetime of Ann Simpson, Jane Paul or Mr. Fitzgerald in her right should become entitled to a distributive part of the personal estate and effects of Ann Simpson, as one of her next of kin, Mr. and Mrs. Fitzgerald, or one of them, would, within six months next after Mrs. Simpson's death, out of Mrs. Fitzgerald's distributive share of and in Mrs. Simpson's personal estate, pay to the trustees 5000*l.*, free from all deductions, if such distributive share should be sufficient for that purpose, or if not, then so far as the same would extend. And it was thereby declared that the said trustees should stand possessed of the 5000*l.* upon trust, to invest the same in their or his own names or name in or upon some of the public stocks or funds or on real security or securities of and in Great Britain or Ireland at interest, and upon further trust during the joint lives of Mr. and Mrs. Fitzgerald to pay the interest of the trust fund to Mrs. Fitzgerald for her * separate use, without power of anticipation, and subject as aforesaid to pay such income to the survivor during his or her life ; and from and after the decease of the sur-

vivor, for all and every the child or children of Mrs. Fitzgerald by Mr. Fitzgerald who being a son or sons should live to attain the age or ages of twenty-one years, and who being a daughter or daughters should live to attain the like age or ages of twenty-one years or be married, share and share alike, and if there should be only one such child, then the whole to be for the benefit of one such child. And Mr. Fitzgerald thereby also covenanted with the trustees to settle in manner therein mentioned any future fortune, portion, moneys, or estate over and above the 5000*l.* which should come to or devolve upon Mrs. Fitzgerald or upon Mr. Fitzgerald in her right upon the death of Mrs. Simpson, or of any other person or persons, or by or under any will or by donation or settlement, or by the statute for the distribution of the estates of intestates, or otherwise howsoever.

Lady Paul, the mother of Mrs. Fitzgerald, predeceased Mrs. Simpson, who died in February, 1844, whereupon Mrs. Fitzgerald became entitled to a distributive share of Mrs. Simpson's estate amounting to about 16,000*l.* There was only one child of Mr. and Mrs. Fitzgerald who lived to attain a vested interest under the settlement; namely, Pamela Françoise Lucie, who had married Mr. James Turner.

At the commencement of the month of April, 1846, there was standing in the names of the trustees of the settlement 15,595*l.* 4*s.* 9*d.* 3*l.* 5*s.* per cent annuities which had arisen from the investment of the greater portion of the distributive share of Mrs. Fitzgerald in Mrs. Simpson's personal estate.

* In 1846 the trustees sold out this stock for sums amount- * 294
ing together to 15,119*l.* 9*s.*

By an indenture dated the 14th of September, 1847, and made between the bankrupt William Strahan, Sir John Dean Paul the father, and the bankrupts Sir John Dean Paul and Robert Makin Bates of the first part, Lord Alvanley and the bankrupt Sir John Dean Paul of the second part, Mr. and Mrs. Fitzgerald of the third part, and Joseph George of the fourth part, reciting a bond of General Cavendish to Robert Snow and Sir John Dean Paul the father, dated the 4th of November, 1830, for 8000*l.* and interest, a bond of the Marquis of Normanby to the bankrupts dated the 25th of February, 1845, of 5000*l.* and interest, a bond of Viscount Newport, to the bankrupts dated the 22d of February, 1847, for 2000*l.* and interest, a bond of Henry Broadwood, Esq., to the

bankrupts dated the 27th of August, 1847, for 3000*l.* and interest; and also reciting that the several sums of money secured by the above in part recited bonds amounted altogether to the principal sum of 13,000*l.*, and that under and by virtue of the settlement made previous to the marriage of Mr. and Mrs. Fitzgerald, Lord Alvanley and the bankrupt Sir John Dean Paul became possessed of the sum of 13,000*l.*, which it was agreed (with the consent and approbation of Mr. and Mrs. Fitzgerald) should be advanced to the parties thereto of the first part upon the security of the assignment thereafter contained of the moneys secured by the recited bonds, it was thereby witnessed, that in order to carry the arrangement and agreement into effect, and in consideration of the premises and particularly in consideration of the sum of 13,000*l.* trust money being at or before the sealing and delivery of the indenture in statement advanced and paid by Lord Alvanley

* 295 and John Dean Paul (with the consent * and approbation of Mr. and Mrs. Fitzgerald) to the parties thereto of the first part, the parties thereto of the first part, at the request and by the direction of Lord Alvanley and John Dean Paul as trustees as aforesaid, and with the consent and approbation of Mr. and Mrs. Fitzgerald, assigned unto Joseph George, his executors, administrators, and assigns, all those the said in part recited bonds, together with the principal moneys respectively secured thereby, and all interest then due and thenceforth to grow due for the same respectively, to hold the said bonds and the moneys secured thereby respectively and thereby assigned, and all interest then due and thenceforth to grow due or payable for the same respectively, unto Joseph George, his executors, administrators, and assigns, but upon trust nevertheless to reassign the same as therein mentioned unto Lord Alvanley and the bankrupt Sir John Dean Paul, their executors, administrators, and assigns, to be held by them upon the trusts of the settlement, or such of those trusts as might be then subsisting or capable of taking effect.

The 13,000*l.* advanced to the banking firm, as recited in the indenture of the 14th of September, 1847, was in fact, though not so recited in the deed, part of the proceeds of sale of the sum of 15,595*l.* 4*s.* 9*d.* stock, and the four several bonds assigned by the same indenture were at the time of the execution thereof the property of the parties thereto of the first part.

The indenture of the 14th of September, 1847, was prepared by

Mr. James Thomas Cookney, who was the family solicitor of Sir John Dean Paul the father, and also of the bankrupt Sir John Dean Paul, and the execution of the indenture by all the parties of the first part was attested by James Thomas Cookney, who had in * fact previously prepared the indenture of settle- * 296 ment of the 2d of November, 1827, and in whose possession the last-mentioned indenture was at the date of the execution of the indenture of 1847.

Joseph George did not execute the indenture of the 14th of September, 1847, nor was any such reassignment as was contemplated by that indenture ever executed by him.

Shortly after the execution of the indenture of the 14th of September, 1847, a tin box was procured on behalf of Lord Alvanley and the bankrupt Sir John Dean Paul, the trustees of the settlement, and the four bonds expressed to be assigned by the indenture of the 14th of September, 1857, were deposited in it, and the tin box, with a parchment label thereto, whereon were the words, "Lord Alvanley and J. D. Paul," was deposited in the strong room of the banking firm with other boxes containing securities belonging to customers.

General Cavendish's bond for 3000*l.* remained in the tin box down to the time of the bankruptcy, and was found in the box when it was afterwards delivered over to the appellants' solicitors.

Lord Normanby's bond for 5000*l.* continued in the tin box till May, 1852, when it was paid off and delivered up to the obligor, the money being applied for the general purposes of the banking firm, who deposited in the box in lieu of the bond a bond of the Namur and Liege Railway Company for 5000*l.* This bond was also paid off in the early part of January, 1854, and the amount appropriated to the general purposes of the banking business. The following entry as to this transaction was made at the time in the firm's ledger under * the head of "receipts from sundry * 297 persons," — "Received from the Namur and Liege Railway Company, for Mrs. Fitzgerald's trust, 5002*l.* 1*s.* 1*d.*" No other security was substituted for this bond.

Lord Newport's bond for 2000*l.* remained in the box until September, 1852, when it was paid off and delivered up to Lord Newport, the money being applied for the general purposes of the banking firm, who deposited in the box in lieu of it a bond of Lord Normanby to the bankrupts, dated the 10th of May, 1852, for

2000*l.* and interest. The following entry appeared in the books of the firm relative to this transaction:—

“September 29, 1852.—Received from Mrs. Fitzgerald 2000*l.* secured by a bond of Lord Normanby’s for 2000*l.* dated May 10th, 1852.”

This last-mentioned bond of Lord Normanby was found in the box as aforesaid when delivered up to the appellants’ solicitors.

Mr. Broadwood’s bond for 3000*l.* remained in the box until March, 1848, when it was paid off by Mr. Broadwood and delivered up to him, the amount being applied for the general purposes of the banking firm, who deposited in the box in lieu of Mr. Broadwood’s bond one of Mr. Bowes for a like amount. This bond remained in the tin box until December, 1851, when it was paid off and delivered up to Mr. Bowes and the money applied towards the general purposes of the banking firm. In lieu of it the bankrupts set apart two deeds dated the 7th of December, 1849, and the 20th of January, 1851. One of these was made between

Francis Blake of the one part, and the bankrupts and the
 * 298 late Sir John Dean Paul of the other part. It was * an assignment of certain household furniture for securing the sum of 1000*l.* and interest, and contained a personal covenant by Francis Blake to pay the amount secured. The other deed was made between the same parties, and was an assignment by way of mortgage of a judgment debt for further securing the sum of 1000*l.* already lent, and also the further sum of 2000*l.* It contained also a personal covenant by Francis Blake to pay the 2000*l.*

The tin box was not sufficiently large to contain these deeds, and they were wrapped up in paper tied up with red tape and indorsed with the names of the trustees of the settlement. The parcel was deposited in a strong box commonly used by the banking firm for the purpose of containing the securities of their customers. Before the bankruptcy of the firm the two deeds were delivered to Mr. Cookney, the private solicitor of the bankrupt Sir John Dean Paul, and they continued in Mr. Cookney’s custody to the date of the bankruptcy.

The following entries appeared in the books relative to the bond of Mr. Broadwood, the substituted bond of Mr. Bowes and the securities given by Mr. Blake:—

"1848. — Received of Lord Alvanley and J. D. Paul 3000*l.* under the head of Mr. Bowes's account."

"December 18, 1851. — Paid Mrs. Fitzgerald for this bond, with interest from 1st February, 1851, 3000*l.*"

In the course of the period during which the transactions took place which have just been detailed, the following events occurred: On the 16th of November, 1849, Lord Alvanley died. On the 16th of January, 1852, Sir John Dean Paul the father died. On the 18th of March, 1852, by an indenture of that date, made * between Mr. and Mrs. Fitzgerald of the first part, the * 299 bankrupt Sir John Dean Paul of the second part, and William Strahan of the third part, William Strahan was under a power contained in the indenture of the 2d of November, 1827, duly appointed a trustee thereof in the room of Lord Alvanley.

On the 11th of June, 1855, a petition for adjudication in bankruptcy was filed against William Strahan, Sir John Dean Paul, and Robert Makin Bates, and on the same day they were duly adjudicated bankrupts.

By an indenture dated the 30th of August, 1855, the appellants were under the power contained in the settlement appointed new trustees thereof, in the room of the bankrupts Sir John Dean Paul and William Strahan.

Shortly after the appellants were appointed trustees they applied to the official assignee and requested that the tin box might be delivered up to them, and the official assignee having complied with this request the box was opened and was found to contain (among other documents not affecting the question) General Cavendish's bond for 3000*l.* and Lord Normanby's bond for 2000*l.*

The petition of appeal, after stating to the above effect, stated that by the means aforesaid the sum of 13,000*l.* received by the bankrupts and their late copartner Sir John Dean Paul deceased became lost to the trust estate, save only so far as any portion thereof might be recoverable under the bonds of General Cavendish and Lord Normanby for 3000*l.* and 2000*l.*, and under the securities of Mr. Blake, but that the assignees disputed the appellants' right to the bonds and securities, and had recently brought an action against the appellants for the purpose of recovering the bonds from them. That, in * addition to the 13,000*l.*, * 300 other part of the trust estate, amounting to 4000*l.*, was

applied by the banking firm for the purposes of their business.

That an account was opened by the banking firm with Mrs. Fitzgerald, headed thus: "Mrs. Fitzgerald in account with Messrs. Strahan & Co.," and that in it Mrs. Fitzgerald was credited with the interest from time to time due on the trust funds, amounting in the whole to upwards of 17,000*l.*, which by the means above mentioned reached the hands of the firm.

That from December, 1847, to December, 1851, credit was, by a series of entries, specifically given to Mrs. Fitzgerald for interest on the several securities from time to time representing the sum of 13,000*l.*, the last of such series of entries, viz., that in 1851, being as follows:—

" Dec. 3, p. General Cavendish	£72 16 2
" p. Viscount Newport	48 10 10
" p. Marquis Normanby	121 7 1
" p. F. Blake	72 16 3"

That subsequently to December, 1851, and down to the date of the bankruptcy, interest on the 13,000*l.*, was credited in the account half-yearly as follows:—

" p. Strahan & Co.	£315 10 5"
----------------------------	------------

That in January and June, 1854, interest on the 4000*l.* was credited as follows:—

" p. Strahan & Co.	£97 1 8"
----------------------------	----------

On the 11th of December, 1855, the appellants claimed to prove for 17,231*l.* 2*s.* 7*d.* against the separate estates of the bankrupts Sir John Dean Paul and William Strahan, when the com-
 * 301 missioner allowed the appellants *to prove against the separate estate of Sir John Dean Paul for that amount.

On the 11th of March, 1856, the appellants made a further application to the commissioner to be allowed to prove the amount against the separate estate of William Strahan, but the commissioner, by the decision under appeal, held that the appellants had no right of proof against that estate.

The petition of appeal prayed that the appellants might be declared entitled to prove against the separate estate of Strahan without prejudice to their securities, or, if not, that directions might be given for the realization of the securities and their application in payment of the appellants' debt. By arrangement the question whether the above securities or any of them were in the reputed ownership of the bankrupts was also submitted to the decision of the Court, it being agreed that no notice of the appellants' securities had been given to General Cavendish, Lord Normanby, or Mr. Blake.

Mr. Swanston and *Mr. Haynes*, in support of the appeal. — First. It is clear that all the partners had notice that the 13,000*l.* were trust moneys, and that the advance of them to the firm was a breach of trust, consequently the separate estate of each partner is liable. *Ex parte Woodin.* (a) Next, as to the 4000*l.* The bankers, by payment of interest on the sums constituting this amount, recognized the trust and constituted themselves trustees. The same reasoning, therefore, applies to these sums. Lastly. As to the securities in the box, and those set apart and indorsed with the names of the trustees, there *is no *302 ground for holding them to have been in the reputed ownership of the bankrupts. In order to bring the case within the 125th section of the Bankrupt Law Consolidation Act, the bankrupts must be shown to have had these securities in their order and disposition; secondly, they must appear to have been the reputed owners; and thirdly, the consent of the true owner must be shown. Now, the debt due on General Cavendish's bond was never in the order and disposition of the firm. It belonged to the bankrupt Sir John Dean Paul as the executor of his father, the surviving obligee, and was properly in his custody as the true owner, or in that of himself and Mr. Strahan as trustees of the settlement. Of the other securities, if the bankrupts were the reputed owners, they were so without the consent of the true owners, for Mrs. Turner at all events was wholly unaware of the dealings with the securities. The persons beneficially interested under the settlement, and not the trustees, are in such a case the true owners, unless where the latter are acting within the

(a) 3 M., D. & De G. 399.

scope of their authority. It would be most inequitable that the bankrupts' estate should be allowed to profit by their fraud.

They referred to *Ex parte Dale*, (a) *Ex parte Barclay*, (b) *Joy v. Campbell*, (c) *Viner v. Cadell*, (d) *Ex parte Martin*, (e) *Ex parte Horwood*, (g) *Ex parte Henchcliffe*, (h) *Load v. Green*, (i) *Whitfield v. Brand*, (k) *Ex parte Burbidge*, (l) *Ex parte Carlow*. (m)

Mr. Chandless, *Mr. Surrage*, and *Mr. Hannen*, for the
 * 303 assignees. — * As to the 13,000*l.*, those moneys were never received by the bankrupts as trust moneys, and the bankrupt Strahan in his examination denies having had any notice of this fact. As to the constructive notice sought to be established, nothing could be more dangerous than to apply that doctrine to the case of bankers, and to attempt to fasten upon them the execution of trusts attaching to money paid to them generally. It would be a considerable extension of the doctrine of constructive notice, which has already been carried too far, to hold that a banker can be affected with notice by means of such entries as are proved in the present case. On the question of reputed ownership *Ex parte Horwood* (g) has no application to the present case, for the possession there was consistent with the terms of an express trust to which the property was subject. But here it was in violation of the trust, and as no notice was given of the appropriation of these securities to the trusts of the settlement they remained in the bankrupts' order and disposition, as appears clearly from their having received the moneys payable on some of the original securities for which some of those now in question are said to have been substituted. As to General Cavendish's bond, it is true that the firm were not obligees in it, but the obligor was debited with interest by the firm and must have considered the firm as his creditors, and the debt must have been in the reputed ownership of the firm. The effect of the enactment as to

(a) Buck. 365.

(b) 5 De G., M. & G. 403.

(c) 1 Sch. & Lef. 328.

(d) 3 Esp. 88.

(e) 19 Ves. 491; 2 Rose, 331.

(g) Mont. & Mac. 169.

(h) Mont. 24.

(i) 15 M. & W. 216.

(k) 16 M. & W. 282.

(l) 1 Mont. & Ayr. 689; 1 Deac. 131.

(m) 2 Mont. & Ayr. 39.

reputed ownership is not excluded by a constructive trust, or it would be scarcely ever enforceable. It is not the *cestui que trust* but the trustee who is the true owner in such a case, and therefore the argument fails as to there having been no consent on the part of the true owners.

They referred to *Darby v. Smith*, (a) *Ex parte Butler*, * (b) *Jarman v. Woolloston*, (c) *Earl of Shaftesbury v. Russell*, (d) *Jones v. Gibbons*. (e) * 304

Mr. Swanston, in reply.

May 8.

THE LORD JUSTICE TURNER. — This is the petition of the present trustees of the marriage settlement of Captain and Mrs. Fitzgerald, praying that the petitioners may be at liberty to prove against the separate estate of Mr. Strahan for a sum amounting to about 17,000*l.*, forming part of the funds which were formerly subject to the trusts of that settlement, but which has been lost by the bankruptcy of those bankrupts, and that such proof may be made without prejudice to certain securities.

It appears that Mrs. Fitzgerald, who was the daughter of the late Sir John Dean Paul, and sister to the present bankrupt Sir John Dean Paul, had at the time of her marriage an expectant interest in the property of a lady of the name of Anne Simpson. If Lady Paul (Mrs. Fitzgerald's mother) survived Anne Simpson she took the bulk of the property, Mrs. Fitzgerald taking only 5000*l.* In the event of Lady Paul dying in the lifetime of Miss Simpson, the property would devolve upon Mrs. Fitzgerald. This expectancy in the property of Miss Simpson was to be subject of the settlement, by which it was agreed that 5000*l.* should be settled to the separate use of Mrs. Fitzgerald for her life and afterwards upon trusts for the husband and children, and the settlement contained a covenant by the husband that after-acquired property of the wife should be settled upon the trusts therein mentioned.

* The marriage took place in 1837, and before April, * 305

(a) 8 T. R. 82.

(d) 1 B. & C. 666.

(b) 6 Jur. 957.

(e) 9 Ves. 407.

(c) 8 T. R. 618.

1846, a sum was received from Mrs. Simpson's estate which was invested in the purchase of 15,595*l.* consols. This sum became subject to the trusts of the settlement, the then trustees of which were the late Lord Alvanley and the present Sir John Dean Paul. In the month of April, 1846, 18,000*l.* consols, part of this sum of stock, were sold out, and in the following June the remainder were sold, and they produced altogether 15,119*l.* sterling. It is not clear upon the evidence what became of these sums of money at first, but they found their way into the banking house in which Sir John Dean Paul, the father of the bankrupt, was then also a partner. In that state of circumstances, in September, 1847, a deed was made between the bankrupt William Strahan, the late Sir John Dean Paul, and the bankrupts Sir John Dean Paul and Robert Makin Bates, all the then partners in the bank, of the first part, Lord Alvanley and the bankrupt Sir John Dean Paul of the second part, and Captain Fitzgerald and his wife of the third part. [His Lordship stated the substance of the deed, to the effect above set out.] The transaction carried out by this deed constituted, it is clear, a direct and gross breach of trust, since the settlement did not authorize any investment except upon government or real security. All the partners were parties to this deed, and by means of it had direct and express notice of the breach of trust. Matters remained thus until March, 1852, when Mr. Strahan was appointed a trustee in the place of Lord Alvanley. Mr. Strahan had been a party to the deed of 1847, and not only knew that the trust funds were not properly invested, but had taken part in placing them in an improper state of investment. When he became himself a trustee he was bound to see that the funds were duly invested.¹

* 306 During the opening of the case, therefore, we * had no doubt that Mr. Strahan was separately liable in equity for the 18,000*l.*, or that the appellants had a right to prove against his separate estate. It was also clear, that as the bond debts constituted part of the joint estate of the firm, the right to prove against the separate estate must be without prejudice to the securities. The question, therefore, was narrowed to the proof for the remaining sum of about 4000*l.*, and to the further question submitted to the Court by agreement between the parties as to their right to the securities in question.

See *Lewin Trusts* (5th Eng. ed.), 171.

The right to prove for the 4000*l.* against the separate estate of Strahan depends upon the question whether he was liable as a trustee for the payment of that sum. It appears to have consisted partly of the surplus proceeds of the stock sold out in 1846, after deducting the 13,000*l.* invested upon the bonds, partly of 1000*l.* received from Ann Simpson's estate, and partly of 1100*l.* which the bankrupt Sir John Dean Paul received on account of his sister Mrs. Fitzgerald from the estate of the late Sir John Dean Paul, or under some settlement made by him, but which did not come to the hands of the bankrupt Sir John Dean Paul before Mr. Strahan was appointed a trustee.

In the course of the argument strong comments were made on the conduct of Mr. Strahan in accepting the trust, it appearing from his own admission that he had accepted the trust because the trust fund was in the hands of the firm. No doubt this was a gross irregularity, but the Court must take care that no prejudice arising from this misconduct, however much to be regretted, shall be permitted to alter the rights of innocent parties. It must be remembered that in this case the question is between the creditors of the firm and the *cestuis que trust* under the settlement, both of whom * were innocent parties, as to which are to * 307 suffer by the misconduct of the bankrupt Strahan.

It was argued that he was liable for the 4000*l.*, because he knew or ought to have known, that it had come to the hands of Sir John Dean Paul. This argument is founded on the following facts: Sir John Dean Paul had a separate account as a customer with the firm, and at the time of the bankruptcy a large balance (about 72,800*l.*) was due to him from the firm on this account. This balance arose in great part from trust funds improperly dealt with by John Dean Paul, and the moneys in question found their way into this account. It was urged that Strahan knew, or ought to have known, that this was the case. But, on looking into the evidence, it appears that there were other funds carried to this account besides those arising from breaches of trust. I find no proof that Strahan knew that moneys belonging to Mrs. Fitzgerald ever came to this account, nor do I see any just ground for imputing such knowledge to him. The deed of September, 1847, mentions the trust fund as 13,000*l.* only, and does not notice any other fund. Strahan might well suppose that that sum constituted the whole trust fund. Again, looking at the evidence given by the

bankrupts Sir John Dean Paul and Strahan themselves, although Sir John Dean Paul in some part of his evidence spoke of Strahan's knowing that the trust funds had come into his separate account with the firm, his evidence is not consistent, and it does not clearly appear whether he means the 4000*l.* or the 13,000*l.* On the other hand, there is the clear statement of Strahan that he did not know any thing of any other trust moneys but the 13,000*l.* having come to Sir John Dean Paul's hands. I cannot avoid giving credence to this statement.

* 308 * It is said, however, that knowledge of the fact ought to be imputed to Strahan, because, in addition to Sir John Dean Paul's separate account, there was an account kept by the firm with Mrs. Fitzgerald, and that in this account credit was given her for interest on 4000*l.* every half-year, so that she received interest on 4000*l.* from the firm. But I think that the mode in which the account was kept would rather lead Strahan to think that this was not income of 4000*l.* under the trusts of the settlement, for the interest on the 13,000*l.* is separately credited, which would lead to the conclusion that the 4000*l.* was treated as a different sum, not a sum subject to the same trusts as the 13,000*l.*; or else it was not easy to see why the two accounts were not consolidated. And with respect to the manner in which the interest was credited, it is to be observed that the bank allowed to Sir John Dean Paul interest on the balance of his current account, and that his account was at the same time debited with the same interest as was credited to Mrs. Fitzgerald. So that the state of the account would produce on Strahan's mind the impression that there had been some transactions between Sir John Dean Paul and his sister by reason of which she was entitled to the interest on 4000*l.* apart from the trusts of the settlement.

I am, therefore, of opinion that the separate estate of Strahan is not liable on this ground for the 4000*l.* as received by the bank in breach of trust with his privity. I have felt more doubt on the question whether Strahan ought not to be held liable for wilful default as trustee, and whether a claim might not be admitted on this ground, for perhaps a claim would be more proper than a proof. My opinion, however, is on the whole against the

* 309 right to enter a claim or proof on that ground. The * liability can only be on the ground of default in not seeing to the performance of the covenant by Mr. Fitzgerald to settle the

after-acquired property. And I think that a new trustee under a settlement containing such a covenant is entitled to assume that every thing has been duly attended to up to the time of his becoming trustee. This disposes of the question as to the 2000*l.* and 1000*l.* As to the 1100*l.*, I am of opinion that the Court ought not to charge a trustee under a settlement containing a covenant of this kind, simply for not making inquiries, when there is nothing to lead him to suspect that some funds had fallen in which were liable to the trust. A trustee cannot go on making inquiries from day to day whether any property has fallen in which the husband was bound to settle. In the present case there is no evidence that Strahan had any grounds for suspicion that other funds had become subject to the trust, and the 1100*l.* in question arose from a source not referred to in the marriage settlement. I am therefore of opinion that Strahan was not liable for that sum on the ground of his having been guilty of wilful default.

There remains the question of reputed ownership. The only security of those included in the deed which still remains is General Cavendish's bond. This bond was given to Snow and the late Sir John Dean Paul. Snow died in the lifetime of his partner, and the legal right to sue on the bond is now in the present Sir John Dean Paul as the executor of his father, the surviving co-obligee. It is said that the practice of the new firm in debiting General Cavendish with interest in his account with them was notice to him that the bond had been transferred to the firm, and put the firm in the position of reputed owners. But this argument appears to me to be too refined. It is going beyond the purpose * and meaning of the statute. There * 310 is here no reputed ownership, as distinguished from the true ownership. I have, therefore, no doubt that this bond is subject to the security.

The other securities now in question are Lord Normanby's bond for 2000*l.* and Blake's securities given to the firm. Lord Normanby's original bond was paid off, Lord Newport's was also paid off, and the present bond of Lord Normanby substituted for it. Broadwood became bankrupt, and Blake's securities were substituted for his bond. As to these substituted securities, one thing is clear, that the *cestuis que trust* had a right against these securities in the hands of the firm. They remained in the hands of the firm, appropriated no doubt to the trusts, but so appropriated

by the firm. Mr. Blake's securities were not actually in the box, but as against the firm the *cestuis que trust* had before the bankruptcy a right to compel an appropriation of them to the trusts. The firm were the true owners of the securities, but bound by the right of the *cestuis que trust* to fix them with the trusts. There was, therefore, no consent of the true owners, for the true owners and reputed owners were the same persons; therefore the principle of the case of *Joy v. Campbell* applies.

THE LORD JUSTICE KNIGHT BRUCE. — I am entirely of the same opinion.

1856. April 17. Before the LORDS JUSTICES.

A decree directed a reference to the taxing master to tax the defendant's bills of costs, and a reference to the Master in Ordinary to take an account of all the dealings and transactions between the plaintiff and the defendants. By a subsequent order made on a motion it was directed that, notwithstanding the decree, both references should go to the taxing master: *Held*, —

1. That the order was erroneous, as varying the decree in such a manner in which it could not be varied upon motion without consent.²
2. That matters unconnected with bills of costs could not, under the 9th Order of the 26th of October, 1842, be referred to the taxing master.³

THIS was an appeal from an order made by Vice-Chancellor STUART upon a motion, whereby it was directed that, notwithstanding the decree made on the hearing of the cause, dated the 22d of December, 1851, it should be referred to the proper taxing master of the Court, having regard to the declarations in the decree contained, to take an account of all sums of money received and paid by the defendant Savery, on account of the plaintiff and defendant Richard King, and of all dealings and transactions between the plaintiff, either solely or together with the defendant Richard King and the defendant Savery, as in the pleadings mentioned, and to

¹ S. C., 5 H. L. Cas. 627.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1029.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1442.

charge the plaintiff with the amounts at which the bill of fees and disbursements in the order mentioned should be taxed, as in the order mentioned at the respective dates on which the same were charged in the accounts as in the pleadings mentioned, and to charge the plaintiff and the defendant Savery with interest at the rate at which interest was charged in the accounts during the periods for which such interest was then charged, and that the taxing master should be at liberty to state any circumstances relating to the matters aforesaid specially, as he should think fit.

The suit was instituted by a son against his father and against Mr. Savery, the father's solicitor, seeking a declaration that the several accounts between the plaintiff * and the solicitor * 312 which had been settled by the plaintiff were not binding, and that an account might be taken of all sums received and paid by the solicitor to, from, or on account of the plaintiff, and that the bills of costs of the solicitor against the plaintiff might be taxed, and that what should be found due from the solicitor might be paid by him to the plaintiff.

The solicitor filed a cross bill, and the causes were on the 22d of December, 1851, heard before Vice-Chancellor PARKER, who made the decree above referred to.

By this decree it was referred to the taxing master to tax the several bills of fees and disbursements of the defendant Savery as solicitor and attorney of the plaintiff, either alone or jointly with the defendant Richard King, as in the pleadings mentioned, and it was referred to the Master in Ordinary, having regard to the preceding directions, to take an account of the sums of money received and paid by the defendant Savery on account of the plaintiff and of the plaintiff and defendant Richard King, and of all dealings and transactions between the plaintiff either solely or together with the defendant Richard King and the defendant Savery, as in the pleadings mentioned. And in taking such accounts it was ordered, that the Master should charge the plaintiff with the amounts at which the bills of fees and disbursements should be taxed as aforesaid, at the respective dates at which the same were charged in the accounts in the pleadings mentioned, with liberty to the Master to state special circumstances.

Pending the taxation directed by the decree, the taking of the accounts before the Master in Ordinary was deferred until a certi-

cate of the taxation had been obtained. A motion was then
 * 313 made on behalf of the * plaintiff on which the order under
 appeal was pronounced. In support of the motion affidavits
 were read to the effect, that great delay and inconvenience would
 arise from the taxation and the taking of the accounts being carried
 on before different officers, and that the accounts and bills of costs
 were so connected that justice could not be done unless they were
 dealt with together.

Mr. Malins and Mr. J. H. Palmer, for the defendant Savery. —
 The 9th Order of the 26th October, 1842, (a) does not authorize
 the reference to the taxing master of any general matter of ac-
 count. The accounts here directed are between mortgagor and
 mortgagee, and are not connected with bills of costs. They extend
 to payments for china, dresses, and shawls, and various other things
 which are not all connected with the relation of solicitor and client.
 Moreover, the order, though made upon a motion, substantially
 alters the decree, which cannot be varied on an interlocutory ap-
 plication.

* 314 * They referred to *Willis v. Parkinson* (b) and *In re
 Smith*. (c)

Mr. Bacon and Mr. Greene, for the plaintiff. — Convenience re-
 quires the whole account to be taken by one officer of the Court,
 and since the bills of costs constitute the principal part of the
 account, the taxing master's office is the more convenient tribunal.
 The case is not beyond his powers, for taxation of the bills of

(a) That the taxing masters shall perform all such duties as have heretofore
 been referred to or performed by the Masters in Ordinary in relation to the
 taxation of costs, and shall in respect thereof have all such powers and authori-
 ties as are now vested in the Masters in Ordinary: to administer oaths; to
 examine witnesses and parties; to order the production and inspection of books,
 papers, and documents; to proceed *de die in diem*; to make separate reports
 and certificates; to require that any party be represented by a separate solicitor;
 and to direct and adopt all such other proceedings as may now be directed and
 adopted by the Master in Ordinary on references for the taxation of costs, and
 taking accounts of what is due in respect of such costs, and such other accounts
 connected therewith, as may be directed by the Court.

(b) 3 Swanst. 233.

(c) 4 Beav. 309.

costs would include the taking of this cash account, (a) and the whole matter therefore was one which might be the subject of a reference to the taxing master. This is not an alteration in the decree, it is merely a direction for its effectual prosecution, and is like an order changing the Master to whom a reference has been directed.

Mr. Leonard, for the defendant King.

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I should have some difficulty if I were required to say which is the less important, the present appeal motion or the opposition. It appears, however, to me, that the notice of motion before the Vice-Chancellor sought a material variation in the decree. I think that the decree could not be materially varied upon a motion without consent. The order now under appeal, which but slightly departed from the terms of the notice, has, I think, materially varied the decree and was made without consent. The order must be discharged, and the costs of the motion and of the appeal must be costs in the cause.

* THE LORD JUSTICE TURNER. — This case involves two *315 questions: first, as to the jurisdiction of the taxing master; secondly, as to the power of the Court to vary a decree on motion. I should have been glad if the difficulties in the way of supporting such an order as that under appeal could have been got over, for it would evidently be the most convenient course that the taxation and the taking the general account should be carried on before the same officer of the Court. But considerations of convenience cannot authorize the Court to exceed the provisions of an Act of Parliament. The Act 5 & 6 Vict. c. 103, § 3, provides, that the business of the taxing master, besides the taxing of costs, should be "such other business (if any) connected with the Court of Chancery as the Lord Chancellor, with the advice and consent of the Master of the Rolls and Vice-Chancellors for the time being or any two of them, shall from time to time by

(a) Seton on Decrees, p. 428 (2d ed.).

any order direct." The business to be done by taxing masters beyond the taxation of costs is, therefore, to be such as shall be prescribed by any general order of the Court. Then the 9th Order of 26th of October, 1842, provides: [His Lordship read it.]

This order is not very clearly expressed, and one construction that may be put upon it is that it was merely intended to give the taxing master the same powers as were already vested in the Master in Ordinary when the Master in Ordinary was taking accounts under the directions of a decree. But whether this is the true construction or not, and giving the most extended construction that can be contended for to the words "such other accounts connected therewith," still those accounts must be connected with

the taxation of costs. Now let us see what, under the practice as it existed before the Act, were * considered to be accounts connected with the taxation of costs. There are cases on the question both before and after the passing of the Act. In *Jones v. James (a)* it was decided that an account was to be treated as connected with the taxation only when it involved pecuniary advances made on account of the bills under taxation, or which by agreement were connected therewith. A pecuniary account which can be taken under the order is not one involving all pecuniary transactions between the parties, but only those having reference to the payment of bills of costs or payments made for the purpose of being so applied. *Ex parte Smith, (b)* which was decided after the passing of the Act, is to the same effect. The decree in the present case directs a taxation of the bills of costs and also a general account of all dealings and transactions between the plaintiff and the defendant Savery. It is clear that among these transactions there were mortgages, and it is not clear that the mortgages were given to secure the payment of bills of costs, nor that the money had been applied in payment of costs, nor that there was any agreement that it should be so applied. These mortgage transactions therefore are not, so far as it appears, transactions connected with the bills of costs. It is true that the decree may be said to have connected one with the other; but this is not, I think, a connection within the meaning of the General Order. The accounts were not such as could, I think, be referred to the taxing master.

(a) 4 Beav. 309.

(b) 3 Swanst. 233.

But if they could be so referred, there is this further point in the case. The order made by the Vice-Chancellor directs that the accounts which by the decree were directed to be taken by the Master in Ordinary should be taken by the taxing master. I am not aware of any authority to the effect that the Court can on a motion * transfer the duty of taking the accounts * 317 which the Court has directed to be taken by one officer to another and different officer. It is quite contrary to the course of the Court, on a motion after decree, to give such a direction. For that purpose there must be a rehearing, or there must be a direction upon further consideration.

The office of decrees is not merely to declare the rights of parties, but to prescribe the mode of working them out. A supplemental order founded on materials not in the pleadings or evidence is what never has been or ought to be made on motion. I do not find that any of the powers introduced by the Chancery Amendment Act extend to such an alteration as this. The 8th rule of the 42d section is the only enactment approaching it, but that was only intended to prevent the mischief arising from having numerous parties before the Court, and does not apply to the present case; and had it done so the time has elapsed. I thought that perhaps the 15 & 16 Vict. c. 80, might have helped the case, but the clause authorizing the Court to employ accountants does not say any thing which would authorize the Court to direct an account like this to be taken by the taxing master. I concur, therefore, in thinking that this order must be discharged. The costs must be costs in the cause.

1856. April 19. Before the LORDS JUSTICES.

A contingent debt is not barred by a discharge under the Insolvent Debtors Act (1 & 2 Vict. c. 110).

Therefore, where a bond was given to secure payment of 1000*l.* in the event of the obligor becoming entitled in possession to an estate of which his father was tenant in tail in remainder after a prior estate tail, and the obligor took the benefit of the Insolvent Act, and inserted the 1000*l.* in his schedule of debts, and obtained his final discharge, but the obligee had never claimed to

prove in respect of the bond: *Held*, on the obligor becoming entitled in possession to the estate, that the bond debt was not satisfied, but was payable under the trusts of a creditors' deed.

THIS was an appeal from the decision of Vice-Chancellor STUART, refusing to vary the certificate of the chief clerk, by which it was certified that a debt secured by a bond was provable under the trusts of an indenture dated the 3d of August, 1853, which were in the course of being performed under a decree.

The indenture was made between the plaintiff George Hawker of the first part, Frances Mary Hawker of the second part, and the defendants as trustees of the third part. It recited that, under the will of one John Small, the plaintiff was then absolutely entitled to the testator's residuary personal estate, which consisted of 1157*l.* 13*s.* 8*d.* cash in the bank, 15,000*l.* bank stock, 6420*l.* 3*l.* per cent annuities, 7173*l.* 14*s.* 3*d.* reduced annuities, and 22,802*l.* 1*s.* 11*d.* 3*l.* 5*s.* annuities, then standing in the name of the accountant-general, in trust in a cause of *Ponton v. Hawker*, subject nevertheless to the payment of certain costs in the cause and of the several incumbrances charged on the residuary trust fund. The deed further recited, that the plaintiff was indebted to various persons on bonds and other securities, and also by simple contract in various sums of money, and was engaged in prosecuting or defending certain actions and suits at law and in equity. It also recited that, in consideration of the natural love and affection which the plaintiff had for his cousin Frances

Mary Hawker, and of the settlement thereby made by
 * 319 * her, and for divers other good causes and considerations, the plaintiff had agreed to assign the said moneys, stocks, funds, and securities, and all other the personal estate to which he was entitled as aforesaid, to the defendants the trustees, upon the trusts thereafter declared. By the operative part of the deed it was witnessed, that, in pursuance of the aforesaid agreement, the plaintiff assigned to the defendants, their executors, administrators, and assigns, all and singular the moneys, stocks, funds, and securities and all other, if any, the said personal estate of the said John Small to which the plaintiff was entitled under the will aforesaid and under a certain indenture of the 20th of April, 1853, upon trust that the defendants should forthwith call in and collect the said moneys, and after paying certain costs should pay and discharge any incumbrance which might for the

time being be subsisting or charged thereon, or any debt or claim against the plaintiff, or which the defendants should or might otherwise incur in or about the execution of any of the trusts, and should pay and discharge all and every the incumbrances, debt and debts, claims and demands, or claim or demand, which should be proved to the satisfaction of the trustees or trustee for the time being of the deed, upon any evidence they or he should think proper, to be due from George Hawker to any person or persons whomsoever, together with such interest upon such of the said several incumbrances and debts thereinbefore directed to be paid as should carry interest, as the said trustees or trustee should think fit and proper, and to stand possessed of the surplus upon the trusts therein mentioned.

Among the debts certified by the chief clerk to be provided for by the above trusts was the bond debt now in question, which was thus described in the schedule to * the certi- * 320 cate: "To George Edwards, of Stroud, on bond for 1000*l.*, dated the 3d April, 1855."

By the motion, which was the subject of the appeal, the plaintiff moved to vary the chief clerk's certificate by omitting from the schedule the bond debt certified to be due to George Edwards.

The bond, which was dated the 3d of April, 1835, recited the above-mentioned will of John Small, whereby he devised certain estates to the use of Martha Ponton for life, with remainder to the use of Thomas Ponton for life, with remainder to the use of the first and other sons of Thomas Ponton successively in tail male, with remainder to the use of the second and other sons of Martha Ponton successively in tail male, with remainder to the use of Thomas Bagott for life, with remainder to the use of the first and other sons of Thomas Bagott successively in tail male, with remainder to the use of Peter Hawker for life, with remainder to the use of the first and other sons of Peter Hawker successively in tail male, with remainder to the use of the testator's own right heirs. The bond further recited, that Martha Ponton died on the 14th of September, 1809; that Thomas Bagott had died on the 23d of November, 1804, without having had issue; and that Peter Hawker had also died on the 21st of November, 1808, leaving George Hawker, thereafter called George Hawker the father, his eldest son and the plaintiff, the eldest son of George Hawker

the father, surviving. The consideration for the bond was 250*l.*, and the condition was thus expressed: "In case the said George Hawker shall, on or at any time before the decease of the survivor of them the said Thomas Ponton, the great-grandson, and George

Hawker the father, and either under or by virtue of the
* 321 said hereinbefore * in part recited will of the said John

Small deceased, or otherwise, become beneficially entitled to an immediate estate or interest in the before-mentioned trust moneys, stocks, funds, and securities or any of them or any part thereof, or become beneficially entitled to the possession or to the receipt of the rents and profits of the messuages, lands, or hereditaments to be purchased with such trust moneys, stocks, funds, or securities or any part thereof, or in case the said George Hawker at any time thereafter, in pursuance of any arrangement entered into between the said Thomas Ponton and the said George Hawker the father, or the above-bounden George Hawker, for the purpose of barring the estate tail in the said trust moneys and premises, or the messuages, lands, or hereditaments to be purchased therewith, shall receive any sum or sums of money in consideration of his assenting to or concurring in such arrangement, then and in either of such cases, if the above-bounden George Hawker, his heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the said George Edwards, his executors, administrators, or assigns, the full sum of 1000*l.* of lawful money within three calendar months after the above-bounden George Hawker shall have become entitled as aforesaid, with interest for the said sum of 1000*l.* after the rate of 5*l.* per cent, to be computed from the time the above-bounden George Hawker shall have become entitled as aforesaid, or if the above-bounden George Hawker shall not, on or at any time before the decease of the survivor of them the said Thomas Ponton and George Hawker the father, and either under or by virtue of the thereinbefore in part recited will or otherwise, become beneficially entitled to an immediate estate or interest in the above-mentioned trust moneys, stocks, funds, and securities, or any of them or any part thereof, and shall not become beneficially entitled to the possession or

* 322 to the receipt of the rents and * profits of the messuages, lands, or hereditaments, or any part thereof, to be purchased with such trust moneys, stocks, funds, or securities or any

part thereof, then the above-written bond or obligation shall be void and have none effect, or otherwise shall be and remain in full force and virtue."

On the 1st of July, 1842, while the plaintiff's father George Hawker was living, the plaintiff filed his petition under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, for his discharge, and the usual vesting order was made on the 2d of July, 1842.

In the schedule signed and filed by the plaintiff under the provisions of the Act, he entered George Edwards's debt for the 1000*l*. The schedule also contained in the account of receipts the consideration money of the bond, and in the statement of the insolvent's property it contained the following item: "My interest (if any) of, in, and under the will of John Small deceased, bearing date the 25th April, 1786, and proved in Doctors' Commons on the 26th May, 1786, and who thereby devised to trustees his manor and estate at Snowhill, in the county of Gloucester."

All the creditors who proved under the insolvency were paid in full, but Edwards had not come in or proved.

The plaintiff's father died in 1843, and on the 13th of April, 1853, all the previous limitations having determined or failed, the plaintiff became tenant in tail of the estates mentioned in the bond.

Mr. Malins and *Mr. Roxburgh*, for the appellant. — The Act 1 & 2 Vict. c. 110, §§ 75 and 80, discharged the *in- *323 solvent from all personal liability whatever in respect of the debts in his schedule, leaving only a remedy against his after-acquired property for those debts. He was thereby discharged from custody, and also from all liability to be sued in respect of his prior debts. Taking the benefit of the Insolvent Act differs from bankruptcy only in this, that in the former case after-acquired property is liable to be taken under the judgment. But the debts in fact no longer exist as debts. There are no means of recovering them except through the machinery of the Insolvent Court.

[THE LORD JUSTICE TURNER. — Assuming your argument true, is there not still a debt, and if the debtor creates a trust for payment of his debts, why should not this debt be paid among them ?]

It cannot be intended that such a trust extends to the payment

of debts which the author of the trust is not bound personally to pay.

[THE LORD JUSTICE TURNER. — Is a contingent creditor bound to come in under section 80? Is not that section merely permissive?]

That section must be taken in connection with section 75, which explains it. *Viner v. Hawkins*, (a) *Ex parte Hart*. (b) At all events, as the 80th section provides for the valuation of a contingent debt, the amount of such valuation must at the utmost be treated as the amount of the debt, and the creditor, if he still be one, cannot insist upon the payment of the whole.

Mr. Freeling, for the trustees, took no part in the discussion.

Mr. Cairns and *Mr. Amphlett*, for Edwards. — The 80th section does not apply to contingent debts which may never become due at all, but only applies to debts which must become due at * 324 some time, being * similar to the clause in the old Bankrupt Act: *Brown v. Fleetwood*; (c) and even if it does apply, it cannot include a debt like this, payable on such a contingency as to be perfectly incapable of valuation.

Mr. Malins, in reply.

THE LORD JUSTICE TURNER. — The 80th section of the 1 & 2 Vict. c. 110, is not framed in the same way as the 178th clause of the Bankrupt Law Consolidation Act, and does not apply to a contingent liability. The discharge under the insolvency therefore cannot affect Mr. Edwards's claim. Had the debt been provable under the insolvency, I should have wished to hear further argument as to the effect of the discharge.

THE LORD JUSTICE KNIGHT BRUCE. — The trust here was for payment of debts due at the execution of the deed of August, 1853, and this was clearly a debt due at that time. The certificate is right, and the present appeal ought not to have been brought.

(a) 9 Exch. 266. (b) 2 Dowl. & L. 778. (c) 8 Law J., Ex. 169.

* HOWELL v. KIGHTLEY.

* 325

1856. April 18, 19. Before the LORDS JUSTICES.

After eight days from the date of a chief clerk's certificate, it stands on the same footing as a Master's report confirmed absolutely did under the old practice, and will not be discharged or varied except on special grounds.¹

THIS was the appeal of the plaintiff from a decision of the Master of the Rolls, refusing to vary the chief clerk's certificate, by which he found that a good title could not be made to certain leasehold property sold under the decree.

The certificate was signed on the 15th of February, 1856. It was filed on the 29th of February. On the 27th of March, a summons was taken out on behalf of the plaintiff to show cause why the certificate should not be discharged or varied.

His Honor refused to vary the certificate. The case is reported in the 21st volume of Mr. Beavan's Reports. (a)

Mr. Rogers, in support of the appeal.

Mr. Follett and *Mr. Renshaw*, for the respondent. — The plaintiff did not apply in time to vary the certificate. The eight days limited by the 51st Order of the 16th October, 1852, (b) expired without any application having been made by the plaintiff to discharge or vary the certificate, and it was not till the 27th of March that the plaintiff applied to the Master of the Rolls for leave to take out a summons (notwithstanding eight days had elapsed) to show cause why the certificate of the 29th * of February should not be discharged or varied. Under * 326 these circumstances the 34th section of 15 & 16 Vict. c. 80, (c) is conclusive.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1312, n. (3), 1314, and n. (4).

(a) Page 331.

(b) Now the 52d article of the 35th of the Consolidated Orders.

(c) Sect. 34. "When any certificate or report of the chief clerk shall have been signed and adopted by the Judge, the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied either at chambers or in open Court, according to the nature of the case, upon application by summons or motion,

They referred to and relied upon *Turner v. Turner*, (a) *Ware v. Watson*. (b)

Mr. Rogers, in reply, referred to *Pennington v. Lord Muncaster*. (c)

THE LORD JUSTICE KNIGHT BRUCE. — Upon the point of time, independently of any question of title, and howsoever the conditions of sale ought to be construed, I think that the order under appeal cannot be disturbed. At the end of eight days the certificate was in the condition of a report confirmed absolutely, and therefore could not be discharged or varied except upon special grounds. Here no special grounds have been shown; and from what has been stated by the plaintiff's counsel in the course of the argument, it seems not probable that any grounds can be shown sufficient for the purpose. If hereafter any such grounds can be shown, the Court will be disposed to listen to them, so far * 327 as * reason and justice may require. But it will be well for those who may wish to make such an application, to recollect that its object would be to force upon a purchaser a title depending on a special and particular condition of sale, upon which the opinion of a very able Judge has been already given. In the mean time this appeal fails.

THE LORD JUSTICE TURNER. — I do not think it necessary to go into the merits of the case, for I think that to open the certificate would be contrary to the provisions of the statute and the settled course of proceeding in the Court. The clear meaning of the 34th section is, that after eight days the certificate shall be on the same footing as a report confirmed absolute. Every one knows that very special grounds were required to open a report so confirmed. There is no such ground shown here. All that has been stated is, that the purchaser offered to complete the purchase on an abatement of the price, but that the plaintiff refused to accede to these

within such time as shall be prescribed in that behalf by any General Order of the Lord Chancellor; and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same or the like grounds as any report of a Master of the said Court which has been absolutely confirmed may now be opened."

(a) 1 Swanst. 154. (b) 7 De G., M. & G. 739. (c) 1 Madd. 555.

terms. Then a negotiation, it appears, took place between the plaintiff and one of the defendants, but nothing was done to affect the purchaser. No step was taken till the 27th of March. By the old practice of the Court, the report in such a case would have been absolute, and it would be a very injurious course under such circumstances to allow the certificate to be opened. The appeal must be dismissed.

*MARTINEAU v. ROGERS.

* 328

1856. March 19. April 5. Before the Lord Chancellor Lord CRANWORTH.
April 26. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator bequeathed pecuniary legacies to two nephews and a niece by name, if they respectively survived him and attained twenty-one, when the nephews' legacies were to be "paid." In case of the death of either of the nephews or of the niece leaving issue, such issue to take the parent's legacy as the parent should by will appoint. But in case of the death of either of the nephews or the niece before his or her legacy became payable, the legacy to go to the survivors. During the minorities of the legatees the trustees were to apply the income of the legacies for their maintenance and education. The legacy of the niece and any share she might acquire by the death of her brothers, or either of them, was to be settled for her separate use: *Held*, that, upon the whole context, the word "paid" must be construed as "vested" or "payable," and that the executory gift to the issue would take effect in the event of the parent dying after attaining twenty-one.

Where a legacy has been severed from the residue, and a question arises respecting it, the costs of determining such question come out of the legacy.¹

THIS was a special case, which had been transferred from the paper of Vice-Chancellor WOOD, to that of the Lords Justices, and came on to be heard before their Lordships, but before the argument had been concluded their Lordships suggested that it should be heard by the Lord Chancellor. It was accordingly argued on the first of the above days before his Lordship.

The question was as to the construction of the will of Edward Rogers, which was headed "Instructions for a will," but was executed as a will, and had been proved. It was dated the 20th

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1431; *Bigelow v. Morong*, 103 Mass. 287; *Bliss v. The American Bible Society*, 2 Allen, 384.

of March, 1841, and after appointing executors proceeded as follows: "I give to my nephew Edward Martineau, 2000*l.*, and to my nephew William Martineau, 2000*l.*, and to my niece Georgina Martineau 2000*l.*, all free of legacy duty, if they respectively survive me and attain the age of twenty-one years, when the legacies to my nephews are to be paid. In case of the death of either of my said nephews or my said niece leaving issue, such issue to take

the parent's legacy as by his or her will directed. But in * 329 case * of the death of either of my said nephews or niece before his or her legacy payable, his or her legacy to go to survivors of said nephews and niece. During the minority of the said nephews and niece, or any of them, trustees to apply income of legacy for maintenance and education. The legacy of my said niece, and any share she may acquire by the death of her brothers or either of them, to be settled for her separate use, with power by will to dispose of principal amongst children, if any. If no will, amongst children equally. If no children, to sink into residue." And there was a residuary devise and bequest to the testator's brother the defendant Charles Rogers absolutely.

The testator died in 1848. All the nephews mentioned in the will (two of whom were the plaintiffs) attained twenty-one in his lifetime. The question was, whether they took absolutely, or whether the executory trust in favour of their issue might still take effect.

Mr. Elmsley and *Mr. Boyle*, for the plaintiffs.

Mr. Daniel and *Mr. Piggott*, for the defendant.

The following cases were referred to: *Home v. Pillans*, (a) *Clayton v. Lowe*, (b) *Galland v. Leonard*, (c) *Edwards v. Edwards*, (d) *Webster v. Hale*, (e) *Slade v. Milner*, (g) *Clarke v. Lubbock*, (h) *In re Larkin*, (i) *Sturgess v. Pearson*, (k) *Cooper v. Cooper*, (l) *Billings v. Sandom*. (m)

(a) 2 Myl. & K. 15.

(b) 5 B. & A. 636.

(c) 1 Swanst. 161.

(d) 15 Beav. 357.

(e) 8 Ves. 410.

(g) 4 Madd. 144.

(h) 1 Y. & C. C. C. 492.

(i) 2 Jur. N. S. 229.

(k) 4 Madd. 411.

(l) 1 K. & J. 658.

(m) 1 Bro. C. C. 393.

* The Lord Chancellor expressed his opinion, that upon * 330 the whole context of the will the executory trust might still take effect, and that the proper answer to the question would be, that the plaintiffs took absolute vested interests in the legacies, liable to be divested in case of their respective deaths leaving any child or children living at their deaths.

April 5.

On this day the Lord Chancellor said he entertained some doubt as to the correctness of his decision, and directed the case to be reargued before the full Court by one counsel on each side.

April 26. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The case accordingly came on this day to be reargued.

Mr. Elmsley, for the plaintiffs.—The substitutionary gift was merely intended to take effect in the event of a nephew dying either in the testator's lifetime or after his death under twenty-one, for if the nephew survived the testator and attained twenty-one, his legacy is expressly directed to be paid to him. There is nothing in the context to warrant the Court in altering or refusing to give effect to this clear gift, which cannot be destroyed or cut down except by other words equally clear. The words "in case of the death of either of my said nephews or my niece" must refer to death previously to the period of enjoyment. *Galland v. Leonard*, (a) *Home v. Pillans*, (b) *Edwards v. Edwards*. (c) Stress was laid in the former argument on the gift to the issue being made to depend on an appointment by their * parent, which, it was said, implied the parent's having at- * 331 tained twenty-one. But there are cases in which infants may make wills: 1 Vict. c. 26, § 11; and, moreover, the proviso might be effectual in one of the events contemplated, viz., death in the testator's lifetime. In *Palin v. Hills*, (d) although there was a difference between the decisions originally and on appeal, both agreed in the proposition that a person may, as legatee under one will, take a legacy given by another will, which never vested in the second testator, and this power was to give the legacy to the

(a) 1 Swanst. 161.

(c) 15 Beav. 357.

(b) 2 Myl. & K. 15.

(d) 1 Myl. & K. 479.

children of a nephew predeceasing the testator, in such manner as the nephew may have given his own property. Such a state of circumstances is indeed contemplated and provided for by the 33d section of the Wills Act, in the case of children of the testator. *Johnson v. Johnson.* (a)

He also referred to *Doe d. Wright v. Jesson*, (b) *Doe d. Hearle v. Hicks.* (c)

Mr. Daniel, for the executors. — The gift is in express terms defeasible on the death of a nephew or the niece leaving issue, without confining this contingency to the minority of the nephew or niece; and the gift to the issue being made to depend on the parent's testamentary appointment shows that it was to take effect after the parent had attained twenty-one. The settlement of the niece's legacy shows that the word "payable" is not to be strictly construed.

He referred to *Cooper v. Cooper.* (d)

Mr. Elmsley, in reply.

* 332 * THE LORD CHANCELLOR. — In this case we have to decide upon the construction to be put upon the words which have been used in a most ill-drawn will. It appears, in fact, to have been originally intended only as instructions for a will, but having been properly executed it was admitted to probate, and we have to put a construction upon it as a will. When the case was heard before me upon a former occasion, I thought that I had arrived at a satisfactory conclusion, but on turning the matter over in my mind I have felt some doubt as to the correctness of my decision. The case has now been elaborately reargued, and although full justice has been done by *Mr. Elmsley* to the construction which he sought to establish, I have arrived at the same conclusion as before, namely, that these sums must be kept for the children, though I have done so with some regret.

The testator has said, "I give to my nephew Edward Martineau 2000*l.*, and to my nephew William Martineau 2000*l.*, and to my

(a) 3 Hare, 157.

(c) 8 Bing. 475.

(b) 5 Mau. & S. 95.

(d) 1 Kay & J. 658.

niece Georgina Martineau 2000*l.*, all free of legacy duty, if they respectively survive me and attain the age of twenty-one years, when the legacies to my nephews are to be paid." If he had stopped there, on fulfilling the condition precedent of surviving the testator and attaining twenty-one, the legatees would have been entitled to be paid. The question is, whether what follows does not show that the legacies were to be considered as vested, subject to be divested in case the legatees should have any children living at their death. The testator goes on to say, "In case of the death of either of my said nephews or my said niece leaving issue, such issue to take the parent's legacy as by his or her will directed; if no will, equally." That is one alternative; the other alternative is, "But in case of *the death of either of my said * 333 nephews and niece before his or her legacy payable, his or her legacy to go to survivors of said nephews and niece." That leads to the inference that in the previous alternative the testator meant that if his nephews were to die leaving issue after the legacies had become payable, that is, after they had attained twenty-one, the issue were to take. I understand the testator's meaning to be that the legacies were not to be paid at all unless the nephews attained the age of twenty-one years, but that nevertheless the income was to be applied for their maintenance and education during their minority. If either of them died before attaining the age of twenty-one, his legacy was to go to the survivors or survivor; but if either died after he had attained the age of twenty-one years leaving issue, such issue were to take.

The plaintiffs therefore will take the interest for their lives, and each will have power to dispose of the *corpus* by will if he has no issue.

No great difficulty arises as to the niece's legacy, though there is perhaps some inconsistency in the provisions respecting it. The testator directs that if she should die in the lifetime of the testator or before attaining twenty-one, her legacy should go to the survivor of his nephews and niece. But then he goes on to say, "The legacy to my niece and any share she may acquire by death of her brothers or either of them, to be settled for her separate use, with power by will to dispose of the principal amongst children, if any; if no will, amongst children equally; if no children, to sink into residue." Such inconsistency, however, if it exists, will not affect the present question. The result will be that the exec-

utor will keep the fund, and the nephews will be entitled to
 * 334 the income of their respective legacies for life, with * power
 to appoint the *corpus* amongst their children by will, and, if
 no children, absolutely.

THE LORD JUSTICE KNIGHT BRUCE. — The question arising on
 the construction of this will is very difficult, but the inclination of
 my opinion is that the conclusion at which the Lord Chancellor
 has arrived is the correct one.

THE LORD JUSTICE TURNER. — The gifts are conditional on the
 nephews surviving the testator and attaining twenty-one, and there
 is no gift unless they survive the testator. The rest of the will
 proceeds on the footing of their surviving the testator, and there
 is a provision for the event of the death of a legatee before his
 legacy becomes payable, that is to say, before he attains twenty-
 one, in which event the legacy is to go to survivors. There was no
 other event to be provided for except the legatees' dying after
 twenty-one. The other clause is to be read therefore as providing
 for the event of death of either of the legatees after having at-
 tained twenty-one leaving issue, in which event the children are to
 take the parents' legacy as by his or her will directed, or, if no
 will, equally. This falls in with the provisions of the Wills Act,
 under which the parents could make no will unless they attained
 twenty-one. It falls in also with the disposition as to the niece's
 legacy, and the nephews and niece are thus put on the same footing.

Considerable reliance has been placed on the use of the words
 "when the said legacies are to be paid." But the signification of
 these words is controlled and determined by the context,
 * 335 according to which the word * "paid" means "vested."

This also appears from the subsequent part of the will,
 where the word "payable" is applied to the legacies, and also
 from the direction as to the daughter. The difference between
 the directions as to the legacies arose from the different characters
 of the legatees, the testator having meant the nephews to take
 absolutely if they had no children, but that the husband of the
 niece should not take if she had no children.

Mr. Elmsley asked for costs out of the residuary estate.

Mr. Daniel contended that they ought to come out of the legacies.

The following cases were referred to: *Jenour v. Jenour*, (a) *Attorney-General v. Lawes*, (b) *Re Cawthorne*. (c)

Their Lordships held, that as the legacies had been severed from the residue, the costs must come out of the legacies.

* ANDREW v. ANDREW.

* 336

1856. March 8, 10, 11. May 2. Before the LORDS JUSTICES.

A testator contracted to sell lands which he had devised, with stipulations as to easements by reference to a plan, which was lost, and had never been stamped. The purchasers paid the deposit and entered into possession on the footing of the contract, but before any conveyance was executed or any further payment made they became bankrupts. Their assignees elected not to complete the contract, and the property was sold under the bankruptcy, on the petition of the testator, as having a lien for the unpaid purchase-money. He bought it back at the sale for less than the amount due to him, and proved for the difference. On his dying without altering or republishing his will, *held*, that the will was revoked by the contract, and not set up again by its abandonment.¹

THESE were two appeals from a decree of Vice-Chancellor STUART, holding that a devise had been revoked by a contract for sale.

Thomas Andrew, the testator in the causes, by his will bearing date the 29th of October, 1832, devised all those his freehold messuages, lands, tenements, and hereditaments and premises, with their appurtenances, whereof he was seised in fee, situate, lying and being in Crumpsall, Blackley, Harpur Hey, and Collyhurst, in the county of Lancaster, and then in the several tenures and occupations of several persons whom he named, to have and to hold all and every the lands, tenements, and hereditaments, with the

(a) 10 Ves. 562.

(b) 8 Hare, 32.

(c) 12 Beav. 56.

¹ Sugden V. & P. (14th Eng. ed.) 186-188; (7th Am. ed.) 236 *et seq.*; 1 Jarman Wills (4th Am. ed.), 184-189; (3d Eng. ed.) 150-155.

appurtenances, situate as aforesaid, to his son Thomas Andrew for life, subject to the payment of certain annuities and a mortgage ; and after the heir's decease the testator devised the said lands, tenements, and hereditaments unto the son's eldest son lawfully begotten, if he should have arrived at the age of twenty-one years, or so soon as he shall arrive at that age, and, in default of his son's having a son, over.

After the date and execution of this will, and on the 15th August, 1835, the testator Thomas Andrew entered into the following contract : —

“ An agreement made this 15th day of August, 1835,
 * 337 * between Thomas Andrew of the one part and Aaron Lees and William Harrison Lees of the other part. The said Thomas Andrew agrees to sell unto the said Aaron Lees and William Harrison Lees the fee-simple and inheritance, free from all incumbrances, of and in all those the bleach works, buildings, lands, reservoirs, and such right or use as he Thomas Andrew has or is entitled to in or of the river Irk flowing through the said lands or adjoining in part thereto, and all other the hereditaments particularly delineated or described in the map or plan signed by the parties hereto (the same being such part of the estate of him Thomas Andrew, situate in the township of Crumpsall, called the Moss House estate, as now remains unsold, and, by reference to the map or plan, numbered 1, 2, 8, 9, 10, 11, 12, and 13) ; and also of and in the plots or parcels of land and watercourses of him Thomas Andrew adjoining to the before-mentioned premises, called Hunt's Green Slack, situated in the township of Blackley, in the said county, and as the same appears on reference to the said map or plan enclosed within or bounded by pink or red lines and numbered 14, 15, and 16 (the land in Crumpsall and Blackley aforesaid containing together, as appears by a schedule to such map or plan, 31a. 2r. 35p. of statute measure, be the same more or less), save and except the tithes, tenths, offerings, and oblations, of which Thomas Andrew has a lease for the unexpired term of twenty-one years from the 29th September, 1829, and subject to a lease of the 1st March, 1825, granted by Thomas Andrew to Messrs. Wilson & Crighton for the term of thirty years from the 24th June, 1824, of the right of using for the purpose of their print works in Blackley the water of Carver Brook flowing through Hunt's Green

Slack and the Moss House estate into the river Irk, for the residue of the said term, under the yearly rent of 45*l.*; and also of and in the yearly chief rent of 2*l.* reserved and made payable by a certain * indenture of demise of the 28th July, 1821, and * 338 now payable by James Smethurst, his executors, administrators, or assigns, for a small plot of land, part of the Moss House estate, on the south-west side of a street or road in Crumpsall leading from Blackley Street to Moss Fold, containing 320 superficial square yards; and also of and in the yearly rent of 45*l.* payable by Messrs. Wilson & Crighton for the residue of the term of thirty years, and all benefit and advantage of the lessor under the said lease. And it is hereby mutually agreed that Thomas Andrew, his heirs and assigns, owners for the time being of the lands and premises belonging to him Thomas Andrew in the townships of Blackley and Harpur Hey, or either of them, and the lessees, tenants, and occupiers thereof, or any of them or any part thereof, or of any of the buildings to be erected thereon respectively, with or without horses and carriages, along and together with the said Aaron Lees and William Harrison Lees, their heirs and assigns, owners for the time being of the said hereditaments and premises hereby agreed to be sold, as also of the hereditaments belonging to Aaron Lees and William Harrison Lees, and heretofore conveyed to them by Thomas Andrew, and their and his lessees, tenants, and occupiers thereof respectively, or of any of them or of any part thereof, or any of the buildings to be erected thereon respectively, with or without horses or carriages, shall have, use, and enjoy the road or way leading from Blackley, through Hunt's Green Slack and the Moss House estate, to the new turnpike road from Manchester to Rochdale, at the point or place called Three Lane Ends, he and they contributing from time to time to the repairs of the road as hereinafter mentioned. And it is also agreed that the said Thomas Andrew, his heirs and assigns, shall have the power and privilege of laying sewers and drains under such part of the road through Hunt's Green Slack as lies coextensive * with * 339 the land of him Thomas Andrew, to fall into Carver Brook at the place in the map or plan marked or printed 'Ford.' The purchase-money for the said hereditaments to be the sum of 5950*l.*, to be paid as hereinafter mentioned." After provisions as to the superintendence and management of the above-mentioned road, and the mode in which the expenses of maintaining it were to be

borne, the agreement proceeded thus: "That Aaron Lees and William Harrison Lees, their heirs and assigns, tenants and occupiers for the time being, shall contribute and pay in respect of the Moss House estate (of which they will by this contract become the exclusive owners, except as to two certain plots of land heretofore conveyed by Thomas Andrew to Jonathan Andrew) and Hunt's Green Slack" two-thirds of the expenses. Then there was this provision: "That inasmuch as the said Thomas Andrew has already at his own expense furnished unto Aaron Lees and William Harrison Lees, in respect of their former purchase from Thomas Andrew of a part of the Moss House estate, with a factory and buildings thereon erected, an abstract of his title to the Moss House estate, which includes the land, bleach works, and premises in Crumpsall hereby contracted to be sold, as also an abstract of the title of him Thomas Andrew to the land and watercourse called Hunt's Green Slack, in respect of their former purchase from Thomas Andrew of certain cottages erected on part thereof, he Thomas Andrew shall not be required to furnish any further abstract or abstracts as respects the land and premises hereby contracted to be sold or any part thereof, and that Aaron Lees and William Harrison Lees shall be satisfied with the titles as heretofore shown and approved of by their solicitor, and shall not require any evidence of any deeds, writings, or facts recited in the former conveyance." Then there was a provision that the purchasers should have attested * copies, and that the testator was to retain the deeds, as they related to other premises in Blackley. Then the purchase-money of 5950*l.* was to be paid, as to 100*l.* at the time of signing, and as to 5850*l.*, the remainder, on the 25th December then next, when the purchasers were to be let into possession, and all outgoing were to be cleared up to that time by the testator.

The map referred to by the contract existed at the date of it and for some time afterwards, but had since been lost.

Upon the contract being signed the purchasers paid the deposit of 100*l.*, but they paid no further portion of the purchase-money, and no conveyance was ever made to them. They, however, entered into possession of the estate soon after the date of the contract, and continued in possession and receipt of the rents until the death of William Harrison Lees, paying interest upon the unpaid purchase-money.

William Harrison Lees died on the 9th January, 1836, and his interest in the purchased premises thereupon vested in Aaron Lees, who in like manner continued in possession, paying interest down to the time of his bankruptcy.

On the 23d December, 1837, Aaron Lees became bankrupt, and thereupon the testator applied to the assignees for the purpose of ascertaining whether they intended to complete the contract; in answer to which inquiry the assignees, on the 9th March, 1838, stated their determination to abandon the bankrupt's interest in the property.

The testator then presented a petition to the Court of * re- * 341 view in bankruptcy, by which he repudiated the abandonment on the part of the assignees, asserted that the contract was still binding, and claimed an equitable lien for the unpaid purchase-money, and a right to prove against the estate of the bankrupt for so much of the purchase-money and interest as might not be realized by a resale of the estate.

By an order of the Court of review, made upon this petition on the 29th of May, 1838, the Court declared that the petitioner had an equitable lien upon the estate and premises comprised in the contract for the unpaid residue of the purchase-money and arrears of interest due thereon, as mentioned in the petition. And it was referred to the commissioner to take an account of what was due for the unpaid purchase-money, and for the interest upon it. And it was ordered that the estate and premises should be sold before the commissioner, of which due notice was to be given, and that the petitioner should be at liberty to bid at the sale; and it was ordered that if the estate produced more than the amount which was due to the testator, the surplus should belong to the assignees, but that if it produced less, the testator was to be at liberty to prove for the difference.

In pursuance of this order, the property comprised in the contract was put up to sale by auction on the 24th of July, 1839, under conditions of sale, which described the property in the same terms, and expressed that it was offered for sale, subject to the same rights with reference to roads and sewerage as were reserved by the original contract, the description of the property contained in the conditions of sale, and the reservation of the rights following the words of the original contract, which had been entered

- * 342 into between * the Lees and the testator Thomas Andrew ; and the map was referred to.

At this sale by auction the testator became the purchaser of the property for 4600*l.* (5850*l.* being the amount of the principal which was due to him in respect of the purchase-money), and a written contract for the purchase by him at that price, and subject to the conditions of sale, was duly signed.

The property being thus purchased by the testator for less than the amount which was due to him, he made no payment in respect of the purchase-money, but on the 5th of November, 1841, was admitted to claim 1669*l.* 9*s.* 7*d.*, and afterwards, on the 30th of April, 1842, proved under the bankruptcy for 1537*l.* 4*s.* 7*d.*, being the balance due to him in respect of principal and interest of the original purchase-money.

No conveyance was made to the testator by the assignees, but their solicitors approved of a draft of a release of their interest in the premises which had been prepared by the testator's solicitors, and the testator re-entered into possession of the property, and continued in possession of it until his death. He died on the 25th of November, 1843. After his death, a litigation respecting the property arose in this Court, the heir claiming the property upon the ground that the will was revoked, and the devisees, on the other hand, insisting that the will remained in force.

Two bills were filed, one by the heir, the other by the devisees. By the decree made upon the hearing of these causes, dated the 14th of March, 1845, it was amongst other things ordered, "that the Master should inquire and state to the Court whether

- * 343 the testator, after * the date of his will, entered into any, and if any what, contracts for the sale of any, and if any what, parts of his real estate ; and if so, whether the same were binding on the testator, and what was done thereunder, and what became thereof." In pursuance of this decree, the Master made his separate report upon the subject of this property, dated 8th December, 1848, and thereby found the several facts which have been stated in relation to it. Exceptions were taken to this report, the 3d and 13th of which had reference to the finding that the map was lost, and the others to the admissibility of evidence, and to other findings of the report. These exceptions came on to be heard before the Lord Justice KNIGHT BRUCE, then Vice-Chancellor, on 5th March, 1849, when some of them which related to

the admissibility of evidence were overruled by consent, and the Vice-Chancellor, without either allowing or overruling the other exceptions, made an order, by which upon all the other exceptions it was declared that it did not appear what were the hereditaments comprised or intended to be comprised in the contract of the 15th August, 1835; and it was referred back to the Master to review his report, with a direction that the Master was to be at liberty to include the result of the reference in his general report.

From this order the heir appealed to the Lord Chancellor, and upon the hearing of the appeal, the Lord Chancellor made the following order: "It appearing to the Court that the evidence as to the map or plan in the said exceptions mentioned has not been exhausted, and that the Master was not therefore justified in finding that it was lost, his Lordship doth vary the order of the Vice-Chancellor, and allow the 3d and 13th exceptions, and doth, on the ground aforesaid, refer it back to the Master, to review his report."

* In pursuance of the Lord Chancellor's order, the Master * 844 made another separate report, dated the 31st January, 1850, by which he found that Thomas Andrew, Henry Andrew, and Samuel Broadbent, executors of the testator, did, on the death of the testator, take possession of all his deeds, papers, and writings, and that they had frequently searched and carefully examined the testator's deeds, papers and documents, and writings, and that they had never discovered, and that there was not among the deeds, papers, writings, or documents the map or plan or ground plot of or relating to any bleach works, buildings, lands, or hereditaments situate in the townships of Crumpsall and Blackley, or either of them, or any map or plan of the hereditaments and premises mentioned in the contract or agreement of the 15th August, 1835. And the Master found that the map or plan to which the contract or agreement of the 15th August, 1835, referred had existed, and that the following memorandum in the handwriting of John Taylor, who was the solicitor of the testator, was endorsed on the draft of the contract for the sale of the bleach works: "1837, June 6th. — Delivered to Mr. George Andrew, to send to Mr. Thomas Andrew, of Cheltenham, the original contract and the map of the estate referred to in the contract signed by the parties." The Master found that this draft was in the office of Mr. Taylor at the time of his death, and was now in the pos-

session of Frederick Andrew, who came into possession thereof on the death of John Taylor, among other papers of Taylor. And the Master further found that Frederick Andrew had searched for, but had not found, nor at any time had had in his possession, the said map or plan or any copy thereof, and that the map or plan referred to in the contract had existed, but that the same was lost.

This report was absolutely confirmed, and the Master
* 345 * afterwards made his general report under the original

decree, by which, in answer to the inquiry as to the testator having contracted for the sale of any estates, and whether the contract was binding, he referred to his separate reports.

The causes were then heard before Vice-Chancellor STUART upon these reports, and his Honor, by an order dated the 14th March, 1855, ordered "that an inquiry be made what parts of the testator's real estates were comprised in the alleged agreement for sale of the 15th of August, 1835, in the pleadings mentioned."

The chief clerk made a certificate under this order, by which he certified "that the real estate comprised in the agreement for sale is delineated or described in the map or plan marked 'A,' referred to in the affidavit of Edward Nicholson, filed on the 17th of June, 1835, after mentioned." This was a map which was made out from the evidence, but was not the original map or plan which was annexed to the contract.

The causes then again came before the Vice-Chancellor, upon a motion to vary the certificate, and for further consideration. Upon this hearing the Vice-Chancellor made an order, dated the 18th of July, 1855, refusing the motion to vary the certificate, with costs, and declaring that Thomas Andrew, the testator, did, after the execution of his will dated the 29th of October, 1832, by the agreement dated the 15th August, 1835, mentioned in the separate report of Master TINNEY, dated 8th of December, 1848, enter into a binding contract for the sale of the fee-simple of part of the freehold messuages, lands, tenements, and hereditaments by the said will devised to Thomas Andrew, defendant in the first

* 346 and plaintiff in the second suit, * for life, subject to the payment of certain annuities, and a certain mortgage, with remainder over, and that the part of the said devised premises comprised in such agreement was the real estate delineated and described in the map or plan marked "A" in the certificate men-

tioned. And it was thereby declared, that by the said agreement the testator revoked his will, so far as respected the premises comprised in the agreement, and that he died intestate as to the premises comprised in the said agreement, and that the same upon his death descended to the late defendant George Andrew, his heir-at-law. Then there was an account directed of the rents and profits which had been received by Thomas Andrew of those parts of the premises, and also directions as to certain funds in Court which had arisen from those rents and profits, and which would belong to the heir-at-law.

The appeals were on the part of the devisees, complaining of this order, and also complaining of the order of the 14th of March, 1855, by which the Vice-Chancellor directed an inquiry, what were the premises comprised in the contract.

Mr. Elmsley and *Mr. Torriano*, in support of one of the appeals, and *Mr. Bacon* and *Mr. Elderton*, in support of the other. — First, there was never any binding agreement. The agreement is unintelligible without the map. The map was never stamped, and is lost. Secondary evidence of its contents could not, under such circumstances, have been given. *Wickens v. Evans*, (a) *Smith v. Henley*, (b) *Rippiner v. Wright*, (c) *Rez v. Inhabitants of Castle Morton*, (d) * *Huddleston v. Briscoe*, (e) *Blair v. * 347 Ormond*. (g) As the map could not be in evidence, there was no enforceable contract. *Brodie v. St. Paul*, (h) *Brewer v. Palmer*, (i) *Clinan v. Cooke*, (k) *Hodges v. Horsfall*, (l) *Reynolds v. Waring*. (m)

Secondly, if there was an agreement, it was revoked and abandoned, and thus the equitable interest became reunited to the legal estate, which was never divested out of the testator. The contract was abandoned by the assignees under the provisions of the bankrupt law. How could it then remain in force as regarded the testator? The lien arising on the abandonment for the purchase-money is no part of the contract, but is independent of it,

(a) 4 Car. & P. 359.

(b) 1 Phil. 391.

(c) 2 B. & A. 478.

(d) 3 B. & A. 588.

(e) 11 Ves. 583.

(g) 1 De G. & S. 428.

(h) 1 Ves. Jr. 326.

(i) 3 Esp. 213.

(k) 1 Sch. & Lef. 35.

(l) 1 Russ. & Myl. 116.

(m) Younge, 346.

just as the lien is of a purchaser for his deposit when no title is made. *Mackreth v. Symmons*. (a) The abandonment restored the will. *Knollys v. Alcock*, (b) *Bennett v. Lord Tankerville*, (c) *Goodright v. Glazier*, (d) *Sugden's Vendors & Purchasers*. (e)

Thirdly, the equitable estate was merged in the legal, which always remained in the testator. *Lyster v. Mahony*, (g) *Selby v. Alston*. (h)

They also referred to *Ottey v. Pensam*, (i) *Gregory v. West*, (k) *Attorney-General v. Corporation of Chester*. (l)

Mr. Malins and *Mr. J. H. Palmer*, for the respondent the
* 348 heir. — * The plan was in existence at the time of the repurchase by the testator, and there was at that time, at all events, an enforceable contract, so that at that period the will was revoked. But the agreement was sufficiently definite without the map, especially as there had been part performance. The only doubt could have been as to the sewerage. But the purchasers might have waived that stipulation, or the Court could have fixed the most advantageous place for the sewerage, and would not have permitted such a difficulty to defeat the contract. *Gregory v. Mighell*, (m) *Gourlay v. Duke of Somerset*, (n) *Milnes v. Gery*, (o) *Broome v. Monck*, (p) *Owen v. Thomas*, (q) *Morgan v. Holford*, (r) *Shillibeer v. Jarvis*, (s) *Coleman v. Fraser*. (t) The sale was, therefore, complete and effectual; but it is not necessary that an act should be effectual in order to revoke a will, the question of revocation being one of intention. *Lord Lincoln v. Rolles*, (u) *Simpson v. Walker*, (v) *Tebbutt v. Voules*, (w) *Hick v. Mors*, (x) *Abney v. Miller*. (y)

(a) 15 Ves. 329.

(b) 7 Ves. 558.

(c) 19 Ves. 179.

(d) 4 Burr. 2512.

(e) Page 289.

(g) 1 Dr. & War. 243.

(h) 3 Ves. 339.

(i) 1 Hare. 322.

(k) 2 Beav. 541.

(l) Before V. C. STUART, 1856, not reported.

(u) 1 Eq. Ca. Ab. 411.

(v) 5 Sim. 1.

(l) 14 Beav. 338.

(m) 18 Ves. 328.

(n) 1 Ves. & B. 68.

(o) 14 Ves. 400.

(p) 10 Ves. 597.

(q) 3 Myl. & K. 353.

(r) 1 Sm. & Gif. 101.

(s) *Ante*, 79.

(w) 6 Sim. 40.

(x) Amb. 215.

(y) 2 Atk. 598.

Mr. Craig and Mr. Charles Hall, for the executors.

Mr. Elmsley, in reply.

Judgment reserved.

May 2.

THE LORD JUSTICE TURNER. — These are appeals from a decree of his Honor the Vice-Chancellor Sir JOHN STUART. The case is so peculiar * in its circumstances, and involves ques- * 349 tions of so much difficulty, that it is only after repeated consideration, and I may add after repeated changes of opinion, that I have arrived at a conclusion upon it.

[His Lordship then stated the facts of the case and the terms of the agreement nearly in the words of the foregoing statement, and proceeded as follows :—]

The rights of the parties in these causes ultimately depend on two questions. First, whether the will of the testator was ever revoked ; and secondly, if it was, whether the effect of the revocation has been done away with.

The case was most fully and ably argued on the part of the appellants. It was first insisted on their part that there never was any agreement for sale which was binding upon the testator, and that the will therefore never was revoked. This conclusion would not, I apprehend, be open to much doubt if the premises from which it is drawn be well founded, for, generally speaking at least, I conceive that a mere imperfect agreement would not operate to revoke a devise.¹ But upon what premises does this conclusion rest ? The questions, whether there ever was an agreement binding upon the testator, and whether there is an agreement which could now be enforced, are wholly distinct, and the former question must, as it seems to me, depend upon one or other of these two points, — either that the agreement refers to a map or plan signed by the parties, and that there never was any map or plan so signed, or that parol evidence is not admissible to connect the map or plan with the agreement. I much doubt whether

¹ See *Walton v. Walton*, 7 John. Ch. 269.

either of these points is now open to the appellants, for the orders both of my learned brother and of the Lord Chancellor upon the exceptions seem to me to proceed upon the footing that

* 350 the map or plan, if * existing, would be conclusive as to the premises comprised in the agreement, and against the latter of these orders there has been no appeal. But supposing these points to be open to the appellants, the case of *Hodges v. Horsfall* seems to me to be decisive upon the latter of them, and admitting that the former of them might have been open to question had the case rested simply upon the agreement, and the map or plan (and I desire to be understood as not intimating any opinion in favour of the appellants, even had the case been so circumstanced), yet there having been in this case possession by the purchasers under the agreement, and the testator the vendor having himself treated the agreement as having been concluded and having repurchased under it, I think we are bound to hold that there was in this case an agreement for sale which was binding upon the testator, at all events so long as the map or plan existed. If, then, the testator had died during this period, there is no doubt upon the authorities that the will would have stood revoked in equity, the contract subsisting at his death. But as I shall presently state, I think that what was done in this case under the contract was at least tantamount to the contract continuing in force up to the testator's death, and I think, therefore, that in this case there was a revocation of the will.

We have to consider, then, whether the effect of the revocation has been done away with. The appellants have so contended upon three grounds. First, That it cannot now be ascertained what was the property comprised in the agreement, or, in other words, as to what property the will has been revoked. Secondly, That the agreement was abandoned, and that the abandonment of the agreement set up the will. And thirdly, That upon the repurchase by the testator the interest of the purchasers under the

* 351 agreement became merged in * the legal fee which remained vested in the testator and passed to the devisees. Upon the first point I am satisfied that there is now sufficient evidence to show what was the property comprised in the agreement, and that the order of the Vice-Chancellor, refusing the motion to vary the certificate, was right. It was attempted to make out that there was now no further evidence upon this subject than there was

when the causes were before my learned brother upon the exceptions, but this is plainly not the case. The evidence of Nicholson, which is of great importance, has been added, and the certificate, perhaps, might well stand upon that evidence alone, and certainly it is, in my judgment, right, upon an examination of the whole evidence.

But then it was argued that no evidence ought to have been received except the map or plan, and that the map or plan not having been stamped no evidence of its contents could be received, and several cases were referred to upon this head. But here again I doubt whether this point is properly open to the appellants, for the general report refers to the separate report as furnishing the particulars of the property contracted to be sold, and which particulars were founded upon extrinsic evidence, and the general report stands absolutely confirmed, and was not excepted to on the ground of the evidence not being admissible.¹ Assuming, however, the point to be open, the agreement in this case contains other indicia of the property comprised in it than are furnished by the map or plan. The property is described as being such part of the estate of Thomas Andrew, situate in the township of Crumpsall, called Moss House Estate, as now remains unsold, and although secondary evidence may not be admissible of the contents of the map or plan (in consequence of its having been lost and not having been stamped), evidence may be receivable to fill * up the * 352 description of the property contained in the agreement itself.² It is not, however, in my opinion, necessary to decide even this point, for there was, I think, in this case, such part performance as would render it incumbent upon the Court to ascertain what was the property comprised in the contract.

A further difficulty was suggested on this part of the case, that the contract contains a stipulation as to sewerage, in these terms: "And it is also agreed that the said Thomas Andrew, his heirs and assigns, shall have the power and privilege of laying sewers and drains under such part of the road through Hunt's Green Slack as lies coextensive with the land of him the said Thomas Andrew, to fall into Carver Brook at the place in the map or plan marked or printed 'Ford;'" and that it is not and cannot now be ascertained, otherwise than by the map or plan, what was the

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1311 and notes.

² See Sugden V. & P. (14th Eng. ed.) 169.

point marked "Ford." This right of sewerage, however, as I read the instrument, was a new right to arise under the contract and to be created in consequence of the property through which it was to be exercised passing into different hands; and when the testator repurchased from the assignees, so that the whole interest in the property again became centred in him, I think he must be taken to have determined that right. If he had again sold the property the right could not, as I apprehend, have subsisted otherwise than by a fresh reservation of it. There is not, I think, any inconsistency in holding that this right was destroyed by the repurchase, and yet that the estate repurchased did not pass by the will, the destruction of the right depending upon the act of the testator, and the estate not passing by the will arising from the law not allowing after-acquired property to pass without republication. I think, therefore, that this decree cannot be impeached, upon the ground that it cannot be ascertained what was the property * 353 * comprised in the agreement; and upon this part of the case I desire only to add, that if the case was thus situated, that from circumstances occurring after the contract it had become impossible to ascertain the whole of the property comprised in it, but some portions of that property were and could be ascertained, I am not prepared to hold that the will would not be revoked as to the portion so ascertained. As at present advised I do not see how the difficulty arising upon the ascertainment of the entire property could operate to defeat the revoking effect of the contract as to so much of the property as was ascertained.

We come, then, to the question of abandonment, and I see no pretence for holding that this contract was abandoned. The testator, down to the moment of the repurchase, treated it as subsisting.

It is said, however, that if we hold this will to be revoked we shall be going beyond the cases. But, when new cases like the present arise, we must look to the principles on which the antecedent cases have been decided and not to the facts of those cases for our guidance.

This doctrine of revocation by contract seems to rest upon one or other of these grounds, either upon the alteration of the estate, the contract operating in equity as the conveyance would operate at law, or upon the intention, the contract evincing an intention to make a disposition of the estate different from that which is made by the will; and upon one or other of these grounds it is

quite settled by the authorities that whatever may be the effect of an abandonment of the contract in the lifetime of the testator the will is certainly revoked if the contract be subsisting at his death. I leave the question of * abandonment in the life- * 354 time of the testator where it stands, upon the authorities, observing only that the cases which decide that there is a revocation where the contract continues in force till the death, seem to me to assume that there is a revocation by the contract, for the death cannot operate the revocation, and that if there be a revocation by the contract, I do not see how the abandonment can bring again within the operation of the will the property which, by the contract, has been taken out of its operation. But I think it unnecessary in this case to go beyond what has been actually decided. If the decisions proceed upon the alteration of estate, there is in this case that alteration. If they proceed upon intention, I think that there is in this case what is at least equivalent to an intention continuing till the death of the testator. There is the possession by the purchasers and in effect the completion of the purchase, the testator receiving the purchase-money by the resale and the proof. I cannot venture to hold that such a completion of the contract is of less effect than a continuing intention to complete it.

There remains then the question of merger only, and much as I have doubted upon the other points of this singular case, I have doubted more upon this. If this testator had not only contracted to sell the estate, but had actually conveyed it to the purchasers, and had then repurchased and taken a reconveyance, there would no doubt have been a revocation at law. But suppose, instead of selling the entire fee, he had sold and conveyed to the purchasers a limited interest in the estate only, and had then repurchased and taken a reconveyance of that limited interest, would there not have been a merger at law, and how could the heir have maintained an ejectment? And if this be so in the case of a limited legal interest conveyed and reconveyed, ought it not to be so equally by analogy in the case of * a contract for the sale * 355 of a limited interest and a repurchase of the interest under the contract? And if so in the case of a contract for the sale of a limited interest and a repurchase of that interest, ought it not to be so equally in the case of a contract for sale of the fee and a repurchase of the interest under such a contract? Upon a point so new and difficult I confess that I have felt very great embar-

rassment, but upon fully considering the point, I think that the analogy cannot be maintained. There is this distinction between the cases at law and in equity. In the case which I have suggested at law the heir would be defeated, because the limited estate reconveyed to the testator would be absolutely merged or extinguished in the fee remaining vested in him, and could not be dis-severed or drawn out from it. A Court of Law could not again set up the limited estate. But the case of revocation by contract must be dealt with in this Court, and this Court, which certainly does not favour merger, has power to draw out the equitable from the legal estate; and assuming the will to be revoked in equity by the contract, I think that, at all events, in the case of a contract for the sale of the fee (in which case the analogy to the case at law would be in favour of the heir), this Court must follow out the revocation which it has itself created, and for that purpose draw out the equitable from the legal estate.

The novelty and importance of this case have led me to state, perhaps, at too great length my reasons upon it. I have felt it to be a case of great difficulty, but in the result and for the reasons which I have given, my opinion upon it agrees with that of the Vice-Chancellor, and the appeals must therefore be dismissed.

THE LORD JUSTICE KNIGHT BRUCE.—The opinion of * 356 either of the Lords Justices that an * appeal should be dismissed is of course sufficient and effectual for the purpose, whatever may be the opinion or absence of opinion upon the part of the other when the appeal has been heard by them without the Lord Chancellor. It being manifest, therefore, from what my learned brother has now said, that the present appeals must be dismissed, the circumstance that my mind is not satisfied on the subject, that having considered the case much and attentively (as I know that my learned brother, on his part, has also done), I have hitherto been unable to convince myself that these appeals have no good foundation. This circumstance, I say, is immaterial, unless possibly as to the costs or part of the costs of the appeals, and it has seemed to us right not further to delay the judgment of the Court, which is as has been stated, and in which a more prolonged deliberation might possibly induce me to concur, though at present I repeat that I doubt.

The appeals were dismissed without costs.

* POWELL v. LOVEGROVE.

* 357

1856. April 19, 21. May 7. Before the LORDS JUSTICES.

It was part of an agreement to purchase a farm that the vendor should, for twelve years from the completion, be at liberty to require, at his own expense, and the purchaser agreed to grant him a lease of the farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase, "&c." The vendor, just before the completion, wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money (which had been already paid), but stating that the letter was a temporary thing until the completion of the purchase and the execution of an agreement already prepared and intended to be executed. The agreement referred to had been engrossed, and provided for the payment of a rent calculated on the aggregate amount of the purchase-money and expenses of the purchase and of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession, and paid rent calculated on the aggregate amount: *Held*, —

1. That there was a sufficient part performance to exclude a defence founded on the Statute of Frauds to a bill for specific performance of the agreement to take a lease.¹
 2. That the option had been exercised by the vendor to take a lease.
 3. That the agreement was sufficiently definite to be specifically performed.
- Respondent may be ordered to pay costs of appeal.

THIS was the appeal of the plaintiffs from the dismissal by Vice-Chancellor STUART, with costs, of a bill for the specific performance of an agreement to take a lease.

By the agreement in question, which was dated the 17th of May, 1850, and made between the plaintiff's testator Thomas Powell and the defendant John Lovegrove, the defendant agreed to sell to the plaintiffs' testator a farm called Satwell Farm, for 14,500*l.*, subject to conditions, one of which was the following: —

"That the vendor Mr. John Lovegrove shall for a term of twelve years from Michaelmas next, 1850, be at liberty to require, at his own expense, and the purchaser hereby agrees to grant a lease subject to the usual covenants usually inserted in leases of lands and buildings in the neighbourhood and according to the custom

¹ See Fry Spec. Perf. (2d Am. ed.) 251, § 383 *et seq.*; 1 Sugden V. & P. (8th Am. ed.) 151 *et seq.*, and notes and cases cited.

of the country. But it is understood that such lease shall contain a covenant, giving Mr. Lovegrove at the end of the term of * 358 twelve years to be so created the privilege of * selling all hay or straw off the premises, should the purchaser decline to take such hay and straw that be then on the premises at a full market price. And the lease shall contain a clause that the said John Lovegrove, &c. shall not assign or otherwise part with the possession of the said premises or any part thereof (except the cottages) without the consent in writing of the lessor, his executors, administrators, or assigns, first had and obtained in writing. The rent to be estimated at 3*l.* 10*s.* per cent per annum upon the outlay in making the purchase, &c., and payable half-yearly. That in case of insolvency or bankruptcy the term shall be considered at an end unless a responsible tenant shall be procured and of which the purchaser shall accept." And it was agreed that the purchase should be completed at the Michaelmas then next ensuing.

It was subsequently arranged that the purchase should be completed before the time fixed by the conditions, and the following agreement was engrossed, but not signed: —

"Memorandum of an agreement entered into this day of , 1850, between John Lovegrove of Sotwell otherwise Satwell, Berks, farmer, of the one part, and Thomas Powell of Benson, Oxon, Esq., of the other part; whereas the said John Lovegrove did on the 17th day of May last past, agree in writing to sell to the said Thomas Powell his property at Sotwell otherwise Satwell aforesaid, or in some near adjoining parish with five cottages and commonly known as the Satwell Farm, with their appurtenances for 14,500*l.*, and the said Thomas Powell paid by the said John Lovegrove's direction to Moses Dodd the auctioneer 100*l.* as a deposit and in part payment thereof, and it was then thought that the said purchase could not be completed before * 359 * Michaelmas (which was by the agreement the period proposed for the purpose of completion); and whereas it was at the time of signing the said agreement stated by the said John Lovegrove, that the said farm and premises (*inter alia*) were mortgaged to James Morrison, Esq., of Basildon Park, Berks, for 11,500*l.*, which sum was then due with an arrear of interest at 4*l.* per cent and upwards, and amounting together up to the 20th of July last to 14,023*l.* 1*s.* 11*d.*; and whereas it was

at the same time agreed, that if the said purchase could by any means be completed at any time before Michaelmas next so that the said James Morrison's principal and interest might be earlier discharged, whereby a saving of interest would accrue to the said John Lovegrove, he the said John Lovegrove should pay unto the said Thomas Powell interest on the said sum of 14,500*l.*, at the rate of 3*l.* 10*s.* per cent per annum from the day of such payment or payments until Michaelmas-day next, from which day the said John Lovegrove was to take a lease of the said premises for twelve years, at a rental of 3*l.* 10*s.* per cent upon the said Thomas Powell's outlay or money expended by him in the purchase, conveyance, and repairs; and whereas the said Thomas Powell did on the said 20th day of July last pay to the said James Morrison, by the direction of the said John Lovegrove, the said sum of 14,023*l.* 1*s.* 11*d.* as part of the said sum of 14,500*l.*, and on the 30th day of July last, the said Thomas Powell did by the like direction pay to Messrs. Graham & Son the sum of 80*l.*, and he has also this day paid to the said John Lovegrove the further sum or balance of 296*l.* 18*s.* 1*d.* sterling, which said several sums with the said deposit of 100*l.* make together the said purchase-money of 14,500*l.*; be it remembered therefore, and the said John Lovegrove in consideration of the premises hereby, for himself, his heirs, executors, and administrators, agrees with the said Thomas Powell, * his heirs, executors, administrators, and * 360 assigns, as follows, viz.: First, that he the said John Lovegrove, his heirs, executors, or administrators, shall and will on the 29th day of September next, pay to the said Thomas Powell, his executors, administrators, or assigns, the sum of 96*l.* 3*s.*, being interest from the said 20th day of July last on the said 14,023*l.* 1*s.* 11*d.* (being the said mortgage-money, interest, and deposit), and also will pay to the said Thomas Powell on the said 29th day of September next the further sum of 9*s.* 4*d.* as interest on the said sum of 80*l.* from the said 30th day of July last, and also will pay to the said Thomas Powell on the said 29th day of September next the further sum of *l.* as interest on the said sum of 296*l.* 18*s.* 1*d.* from the date hereof up to that time at the rate of 3*l.* 10*s.* per cent, being or intended to be the interest on the sum of 14,500*l.* Secondly, that he the said John Lovegrove (who shall not require the production of the lessor's title), his heirs, executors, or administrators, shall and will on the said 29th day of September next,

or as soon afterwards as the same shall be tendered, accept and take a lease and execute a counterpart thereof of the said hereditaments and premises for twelve years from the said 29th day of September next, at the yearly rent of $\text{£}1$. sterling, payable half-yearly, clear of all taxes, rates, and other deductions and outgoings whatsoever (except the property tax), and subject to covenants not to assign or underlet or part with the possession of the premises or any part thereof, except the cottages, without consent; also a proviso for making the lease void on bankruptcy or insolvency of the lessee, and also subject to such other covenants, stipulations, and provisions as Mr. William John Dodd of Ipsden in the said county of Oxford, valuer, shall decide to be usual and customary, including a covenant to give the lessee the power at the end of the term of selling off the premises * 361 the hay and * straw, if the lessor should decline taking the same by valuation. Thirdly, the said lease and the counterpart thereof are to be prepared by the lessor's solicitor at the expense of the lessee, who is to pay for the same. Fourthly, the said John Lovegrove is to hold the said hereditaments and premises until the 29th September next, rent free."

On this engrossment the purchaser's solicitor wrote the following observations: "The lease is to be granted at a rental based on the outlay, clear of all and every charge whatever, also for insurance." At the foot of this observation the defendant's solicitor wrote another as follows: "This is no doubt the understanding between the parties, but Mr. Lovegrove, the proposed lessee, has not given us the particulars."

On the 20th of July, shortly after the last-mentioned engrossment was prepared, the defendant wrote to Thomas Powell the following letter:—

"London, July 20th, 1850.

"Satwell Farm.

"Sir,— In consideration of your, this day at my request, paying to Mr. Morrison the sum of $\text{£}14,023\text{ }1\text{ }11\text{d.}$ in part payment of your purchase-money of $\text{£}14,500$ for the above farm, I agree to pay you interest on the sum so paid from this day to Michaelmas-day next, at the rate of $3\text{ }10\text{ }s.$ per annum. This memorandum is given as a temporary thing until the completion of your purchase and the signing of the agreement between us already prepared,

and to be then signed, relative to the future holding of the farm by me as your tenant on lease.

"Yours obediently,

"JOHN LOVEGROVE."

The purchase was completed, and the defendant continued * to occupy the farm and to pay the plaintiffs' testa- * 362 tor, and afterwards to the plaintiffs, a rent of 51*l.* 18*s.* 6*d.* per annum, being at the rate of 3*l.* 10*s.* per cent on the aggregate amount of the purchase-money and the sums expended by the plaintiffs' testator in the investigation of the title and in repairs.

No lease was, however, executed, and in 1855, on the plaintiffs requiring the defendant to complete the agreement and accept a lease, he refused to do so.

Mr. Malins and *Mr. Shapter*, for the appellants. — The defendant elected to become tenant by his letter of the 20th of July, 1850, and there has been sufficient part performance to exclude the operation of the Statute of Frauds, if it could otherwise have been set up.

They referred to *Wills v. Stradling*, (a) *Mundy v. Jolliffe*, (b) and in answer to a question from the Court, said that the plaintiff was willing to have the terms of the lease settled in chambers.

Mr. Karslake, for the defendant. — The terms of the agreement provide for the payment of a rent calculated on the outlay in making the purchase, "&c.," but not on expenses and repairs. This is an attempt to add to a written agreement by parol evidence. The agreement itself is too uncertain to be enforced. The acts of part performance relied on are not evidence of any contract, for sometimes the rent was paid with reference to the purchase-money only, and sometimes with reference to it and the expenses. The defendant had twelve years within which to elect whether he would have a lease or not, and he has not elected.

* He referred to *Reynolds v. Waring*, (c) *Price v. Ashe-* * 368
ton, (d) *Dale v. Hamilton*. (e)

(a) 3 Ves. 378.

(d) 1 Y. & C. 441.

(b) 5 Myl. & Cr. 167.

(e) 5 Hare, 369.

(c) Younge, 346.

Mr. Shapter, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The owner of a farm was under the necessity of selling it. He was a yeoman and occupied it himself, and he was desirous of continuing in the occupation notwithstanding the sale. He entered into a contract, which was thus: [His Lordship read it.]

After the purchase had been made on these terms, the document which I will now read was signed by the vendor, the occupier. It was addressed to the purchaser and dated "London, July 20th, 1850." [His Lordship read it.]

It is proved that there was an agreement, not complete in all its terms, but an agreement to which this document refers as "the agreement between us already prepared relative to the future holding of the farm by me." It is clear, therefore, from that as well as the other evidence in the cause, including the constant enjoyment of the property and the communications which took place from time to time between the parties, that, in the language of the conditions of sale just read, the vendor did "require," as he was at liberty to do, the lease.

The only question is, whether all the terms sufficiently appear or have been ascertained between the vendor and the purchaser.

* 364 Now the only possible matter remaining * not cleared up was the amount of the rent which was to be ascertained at 3*l.* 10*s.* per cent on "the outlay in making the purchase, &c." If there had been nothing more, I should have held that this meant the price and the expense of making and completing the purchase, of investigating the title and of obtaining the conveyance. The aggregate of these particulars would be the amount on which the rent was by way of "percentage" to be calculated. It appears, however, that by the agreement between the parties certain repairs were at the outset to be done by the purchaser, and it was agreed between the vendor and the purchaser that he should add to the rent a "percentage" of 3*l.* 10*s.* upon the amount of those repairs. The repairs were done, the amount was ascertained, and it appears that during the period which has elapsed since this part of the year 1850 the rent, with a merely immaterial and accidental variation, has been paid by the vendor on that footing. The parties, therefore, have, by a complete and satisfactorily proved agreement binding in equity, if not at law also, fixed the amount of the rent.

This having been done, the landlord, or those who represented the landlord, became, without or with reason, dissatisfied as to the manner in which, having regard to the custom of the country and the specified liabilities under the lease to be made, the tenant had managed the land of which he had been the owner, and it was wished to have a lease executed, in order to render his liabilities in that respect clear or certain. To execute this lease he objected, not on the ground of any particular complaint against the form of the lease, but on the ground that he was not bound to execute any lease at all, — a ground which, in my opinion, and in that of my learned brother also, wholly fails. Now with regard to the terms of the lease, they have been expressed, as it seems to me, sufficiently in a document to which I have already referred, containing * all the terms of the agreement except * 365 the rent, but the landlord does not desire to hold the tenant to it; he is willing that the lease shall be settled by the Judge to whose Court the cause is attached, or by any branch of the Court, as I understand.

There must therefore be a decree for specific performance, with an option to the defendant to have a lease on those terms, or a lease settled in chambers, an option which he may exercise without prejudice to his right of appeal to the House of Lords. But attention must be given to the date of the lease, because in the case of an action upon a covenant to do repairs the defendant, I believe, is allowed to give in evidence the state of the property at the time of entering into the covenant. Now as it is, accurately or inaccurately, represented on the part of the landlord that the tenant has already broken the covenants by which he would have been bound if he had executed the lease, some provision must be made, and can be made without difficulty, for this.

The costs of the appeal must, I think, be paid by the defendant.

THE LORD JUSTICE TURNER. — The most favourable view of this case for the defendant is to suppose that under the special condition of sale he was at liberty, at any time during the period of twelve years mentioned in that condition, to elect whether he would or would not become tenant of the estate for the term of twelve years. Even assuming that to be the case, I cannot agree in the opinion which the Vice-Chancellor has expressed as to the effect of the letter of the 20th of July, 1850, for it appears

* 366 to me that * that letter amounted to an election on the part of the defendant to accept the lease. The contract of purchase being entered into in May, the payment of the principal part of the purchase-money which was to be paid to the mortgagee was made in July, and in consequence of the contract being then completed instead of being completed in September, as originally intended, it became necessary to make alterations as to the completion of the purchase, having regard to the change which was made in the position of the parties. Thereupon the defendant writes this letter : [His Lordship read it.]

Now it is true perhaps that the terms of the final arrangement were to be embodied in the agreement which was to be then signed, but the letter seems to me to be decisive upon the point that an agreement was to be then signed with reference to the tenancy. The letter therefore, amounted, in my opinion, to an election to become tenant. It says, in effect, "on that day some agreement must be signed between us by which I am to become your tenant of the farm," and the defendant having at that time a right to require a lease, it seems to me that his letter amounted to an election to become tenant under the conditions of sale.

But if the election was not made by the letter, surely there is here sufficient election by the contemporaneous agreement and the memoranda at the foot of it and by the acts of the parties. Contemporaneously with the letter of July, 1850, an agreement is prepared which contains every thing relating to the tenancy with the exception of the amount of the rent to be paid, and at the foot of that agreement there is written by the solicitor of the purchaser, who was to grant the lease, the following memorandum : "The lease is to be granted at a rental based on the outlay clear

* 367 of all and every charge * whatever, also for insurance," at the foot of which the intended lessee's solicitor writes thus : "This is no doubt the understanding between the parties, but Mr. Lovegrove, the proposed lessee, has not given us the particulars," agreeing, therefore, upon the basis on which the rent was to be calculated. The amount of the interest from July, 1850, to September, 1850, is then paid as for the rent down to the 29th of September, and from that time a rent has been paid equal to interest at 3*l.* 10*s.* per cent on the amount of the purchase-money, the costs of the purchase and the amount expended by the lessor in repairs of the premises.

It has been contended that this payment ought to be referred to a tenancy from year to year, and *prima facie* such a tenancy would be created by a payment of this kind. But this is not a case where there is no contract, except what is to be inferred from occupation and payment of rent. There was in this case an agreement to take the property on given terms and at a given rent, and this rent was paid. It is impossible under these circumstances to refer the payment of rent to any thing but the agreement.

There must be a decree for specific performance, with costs, and I agree that this is a case in which the costs of the appeal ought to be paid by the respondent.

Subsequently the terms of a lease were arranged, and the order as drawn up gave no costs of the appeal.

* MOLYNEUX v. ROWE.

* 368

1856. April 29. May 7. Before the LORDS JUSTICES.

After a trifling specific bequest a testator gave his residuary real and personal estate upon trusts for the benefit of his granddaughter and her children. By a codicil, which he directed to be annexed to, and taken as part of his will, he, in consideration of the faithful services of his servant J. R., gave and bequeathed to him "the whole of" the testator's "estate" and "all" his household goods and furniture, linen, china, watches and all other the testator's personal property and effects, free from legacy duty: and the testator confirmed his will in all other particulars thereof: *Held*, affirming the decision of the Vice-Chancellor of the Duchy of Lancaster (*dissentiente* L. J. TURNER), that the devise in the will of the real estate was not revoked by the codicil.¹

THIS was an appeal from a decision of the Vice-Chancellor of the Duchy of Lancaster as to the effect of a codicil to the will of Ephraim Knapper.

The material parts of the will, which was dated the 19th of May, 1849, were as follows: "I give and bequeath unto Ellen Hankey, hereinafter named, one pair of bed stocks, with the hangings,

¹ See as to the force of the word "estate" in a will, *Barnes v. Patch*, 8 Ves. (Sumner's ed.) 604 note; 1 *Jarman Wills* (4th Am. ed.), 577 *et seq.* and notes; *Godfrey v. Humphrey*, 18 Pick. 539; *Ballard v. Goffe*, 20 Pick. 252; *Hunt v. Hunt*, 4 Gray, 193; *Blagge v. Miles*, 1 Story C. C. 426.

mattress, feather-bed, bolster, pillows, and bed-clothing needful and necessary for the same; and as to the residue of all my real estate and effects, whatsoever and wheresoever, I give, devise, and bequeath the same unto and to the use of my friends Thomas Chrichlow Molyneux, of Liverpool aforesaid, chain-cable manufacturer, and Peter Wright and Thomas Hunter, both of Liverpool aforesaid, gentlemen (whom I appoint executors and trustees of this my will), their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon the trusts hereinafter declared (that is to say), upon trust by and out of my residuary real and personal estate, or of the general income thereof, to pay to my old servant and housekeeper Ellen Hankey (who has filled that capacity upwards of thirty-eight years) the yearly sum of 60*l.*, free of legacy duty, during her natural life,

by four equal quarterly payments in every year, each quarterly payment to be made in advance, the * first becoming due immediately on my decease, and to be made within one week after my decease; and I direct that the said annuity, after payment of all my just debts, funeral, and testamentary expenses, shall be the first and prior claim on my residuary real and personal estate; and I direct that the remains of the said Ellen Hankey shall be interred in the same grave as those of my own at Ratherstone aforesaid, or at Saint James's Mount cemetery aforesaid, and that the expenses of her funeral in a decent and private manner shall be discharged and paid out of the income arising from my residuary real and personal estate; and I direct that inasmuch as it has been proposed, stipulated, and agreed upon by my late son Robert Wilson Knapper, in his lifetime, and his wife Elizabeth Knapper, and the said Peter Wright, godfather of their daughter Emily Ellen Knapper (aged twelve years on the 17th day of September last), that she should be tutored and brought up in the faith of the Established Church of England, I for that purpose appoint my said executors, and the survivors and survivor of them, her guardians and guardian, free from the interference or control of any person whomsoever; and I direct that she my said granddaughter shall be educated at some respectable boarding-school to be selected by her said guardians or guardian, the matron whereof and the tutoress wherein shall be of the Protestant faith, and that the expense of her education shall be paid out of the income of my said estate and effects, and

when her education shall have been completed, or previously at the discretion of my said trustees or trustee, I do order and direct that they or he do and shall pay the interest, dividends, and annual proceeds arising from my residuary real and personal estate unto or for the benefit of my said granddaughter during the remainder of her life, upon her own receipts, for her sole and separate use." [Then followed words restraining * antici- * 370 pation.] "And from and after the decease of my said granddaughter, my said trustees or trustee for the time being shall stand possessed of and interested in my residuary real and personal estate, and of and in the funds or securities whereon the same may be invested, and of and in the interest, dividends, rents, and annual proceeds thereof, in trust for all and every or any one or more of the child, children, or issue of my said granddaughter who may attain the age of twenty-one years or marry with the consent of his, her, or their guardian or guardians, if more than one, in such parts, shares, and proportions and in such manner in all respects as my said granddaughter, whether covert or sole, and notwithstanding any coverture, shall by any deed or deeds, with or without power of revocation and new appointment, to be by her executed in the presence of and attested by two or more credible witnesses, or by her last will and testament or by any codicil thereto, direct or appoint; and in default of such direction or appointment, or so far as any such direction or appointment (if incomplete) shall not extend, then in trust for the child or children of my said granddaughter living at her decease who shall be of or shall attain the age of twenty-one years or be married or marry with such consent as aforesaid, and for the issue then living and being of or attaining the age of twenty-one years or being married or marrying with such consent as aforesaid of any child or children of my said granddaughter dying in her lifetime, if more than one in equal shares, but such issue nevertheless to take in the way of representation only (and equally among them when more than one of a class) the share or shares which his, her, or their parent or respective parents would or might have taken under the trust aforesaid on surviving my said granddaughter." Then followed careful provisions as to hotchpot and maintenance, after which the will proceeded thus: "And if * there be no * 371 child or remote issue of my said granddaughter who, under the power or trust hereinbefore contained, shall become absolutely

entitled to my said residuary real and personal estate, then and in such case the same, or so much thereof as shall not become vested under the trusts aforesaid, shall, subject to and immediately on the determination of the trusts hereinbefore contained, be held by my said trustees or trustee for the time being of this my will, in trust for my kinsman Thomas Knapper, of Hanford, in the parish of Trentham, in the county of Stafford, corn-dealer, miller, and grocer, and his daughters Caroline and Eliza, and his son Thomas Knapper (at present a minor aged about twenty years), or such of them as shall survive my said granddaughter, if more than one in equal shares, and their, his, and her heirs, executors, administrators, and assigns: Provided always, and it is my express will and desire, and I do hereby solemnly order, declare, and direct, that if my said granddaughter should intermarry with any person who professes the religion of the Roman Catholic faith according to the doctrine of the Church of Rome, or who has ever been or who shall during the lifetime of my said granddaughter be or become a member or communicant of that church, then and from thenceforth my said granddaughter and her issue shall forfeit all benefit and advantage under this my will, and my said residuary real and personal estates, and the income arising therefrom, then in the hands of the trustees or trustee for the time being of this my will, shall descend to and be held by the trustees or trustee for the time being of this my will, in trust for such person or persons as would then be entitled thereto under this my will, in the same manner as if my said granddaughter was dead without having been married, any thing herein contained to the contrary notwithstanding: Provided and I do hereby declare, order, and

* 372 direct that if the trust hereinbefore * expressed should take effect by the decease of my said granddaughter or by her marriage contrary to my order and direction as aforesaid, and if the said last-named Thomas Knapper shall be then living, I direct that my two tenements, with the lands and appurtenances thereto belonging, situate at Hanford aforesaid, shall be valued by some competent person to be appointed by my said trustees or trustee for the time being, and shall be conveyed to the said last-named Thomas Knapper for all my estate and interest therein, as part of his share, or as the whole if the valuation should amount to so much or more, of my estates and effects under the trusts hereinbefore contained; and I empower the trustees or trustee for the time being of this my will,

at any time or times within the limit prescribed against perpetuities, to sell all or any part or parts of my real, copyhold, and personal estates not consisting of money (except my said tenements and land at Hanford aforesaid) by public auction or private contract, or partly by either mode." Then there followed the ordinary directions, which a professional man would be likely to insert in a case where a sale was directed. There were also a power to lease, careful directions consequent on the provisions made by the will, a provision that the trustees' receipts should be good discharges, and a power of appointing new trustees.

The codicil in question, which was dated the 28th of October, 1850, was as follows: Whereas I, Ephraim Knapper, of Toxteth Park, Liverpool, in the county of Lancaster, gentleman, have made and executed my last will and testament in writing, bearing date the 19th day of May, 1849, and now I hereby declare this present writing to be a codicil to my said will, and direct the same to be annexed thereto and taken as part thereof. In consideration of the faithful services of my servant Joseph Rowe during my sickness and at other times, I *do hereby give and * 373 bequeath to him the whole of my estate, and all my household goods and furniture, linen, china, watches, and all other my personal property and effects that I may be possessed of at the time of my death, free from the control or interference of any person or persons whatsoever, for his absolute use and benefit, free from the legacy duty; such gift and bequest, however, I declare shall not prejudice any claim or demand he may have against me or my representatives for wages due to him from me: and I do hereby ratify and confirm my said will in all other particulars thereof."

The Vice-Chancellor of the duchy made a decree declaring that the devise of the real estate contained in the will was not revoked or affected by the codicil. Joseph Rowe, the legatee named in the codicil, appealed.

Mr. Prendergast and *Mr. Peachy*, in support of the appeal. — The words of the codicil, in their ordinary import, extend to all the testator's property, and there is no restrictive context to give them a different meaning. The word "estate" would be surplusage if it did not include the realty.

They referred to *Midland Railway Company v. Oswin*, (a) *Doe v. Evans*, (b) *Doe v. Langlands*, (c) *O'Toole v. Brown*, (d) *Doe v. Dring*, (e) *Roe v. Yeud*, (g) *Davenport v. Coltman*, (h) *Stokes v. Salomons*, (i) *Warner v. Warner*, (k) *Brockelbank v. John-son*, (l) *Doe v. Chapman*, * (m) *Ford v. Ford*, (n) *Coard v. Holderness*, (o) *Saumarez v. Saumarez*, (p) *Jesson v. Wright*. (q)

Mr. Little, for the respondents. — The authorities referred to were as to the effect of wills and not codicils, and involved the question of testacy or intestacy. Here there is a complete, formal, and careful disposition by the will, and the question is, whether the testator meant to destroy the whole of this disposition by the loosely framed and informal document before the Court. It is to be observed that this instrument indicates no such intention. It describes itself as a codicil, and it confirms the will in all respects, except as far as it alters it. This is not language which would be used by a testator who intended in substance to revoke the whole of the dispositions of the will. Moreover, the use of the words "executors and administrators" shows that the realty was not meant to be dealt with by the codicil. The directions that the gift to the appellant shall be free from legacy duty, and that it shall not prejudice his claim for wages, are irreconcilable with the notion that the appellant was to be the universal devisee and legatee.

He referred to *Doe d. Spearing v. Buckner* (r) *Doe v. Hurrell*, (s) *Newland v. Majoribanks*, (t) *Hearle v. Hicks* (u) *March v. Marchant*. (v)

- | | |
|---------------------------------------|--------------------------------|
| (a) 1 Coll. 74. | (d) 23 L. J., N. S. 283, C. B. |
| (b) 9 Ad. & El. 719. | (e) 2 Mau. & S. 448. |
| (c) 14 East, 370. | (g) 2 B. & P., N. R. 214. |
| (h) 9 Mee. & W. 481, and 12 Sim. 588. | |
| (i) 9 Hare, 75. | (q) 2 Bli. 1. |
| (k) 15 Jur. 141. | (r) 6 T. R. 610. |
| (l) 20 Beav. 205. | (s) 5 B. & Ald. 18. |
| (m) 1 H. Bl. 223. | (t) 5 Taunt. 268. |
| (n) 6 Hare, 486. | (u) 8 Bingh. 475. |
| (o) 20 Beav. 147. | (v) 6 Man. & Gr. 813. |
| (p) 4 Myl. & Cr. 331. | |

Mr. Dickinson, for the trustees.

Mr. Prendergast, in reply.

Judgment reserved.

May 7.

* THE LORD JUSTICE KNIGHT BRUCE. — Ephraim Knapper, * 375 an elderly man, who seems to have lived in Liverpool or its neighbourhood, whose personal property after his death was, for the purpose of probate duty, sworn under 2000*l.*, and who appears to have had some real estate, probably not of great value, made his will dated the 12th of May, 1849, by which he made these dispositions: [His Lordship read the portion of the will above set out.] From the frame of this instrument it may be inferred that it was prepared for the testator with care by a member of the legal profession. The two attesting witnesses are a medical gentleman and a clerk of a firm of solicitors.

The testator in the year 1850 made the codicil now in question, which is in these words: [His Lordship read it.] This codicil seems to have been prepared by an ill-informed, and written by an illiterate person. There are three attesting witnesses to it, but they do not include either of the attesting witnesses to the will. The testator died, I think, in the year 1854. Both instruments have been proved in the Ecclesiastical Court by the executors nominated in the will, and the validity of neither is controverted.

In a suit relating to his property, instituted, I believe, in the year 1855, the Vice-Chancellor of Lancaster has made a decree, which, among other things, declares in effect that, according to the true construction of the codicil, the disposition of his real estate made by the will is not revoked or affected by the codicil. The words are, "This Court doth declare that the codicil has no operation with respect to the said testator's real estate." A conclusion from which the appeal asks us to dissent. * This * 376 decision of the learned Judge is a bold and strong one, and the question of its correctness or incorrectness difficult, I think, and embarrassing. At first sight there seems to be a mere contradiction or an arbitrary rejection of plain words in saying that the real estate is not given by the codicil. But repeated reading and prolonged consideration of the whole of the instrument, in

connection and comparison with the will to which it so pointedly refers, have had with me the effect of weakening that impression more and more.¹ The codicil certainly, disposing of part at least of the testator's property differently from the will, does not in terms revoke the will or any gift made by it. Joseph Rowe, the appellant, however, contends that the codicil, although directed to be annexed to the will and to be taken as part of it, and containing the expressions "I do hereby ratify and confirm my said will in all other particulars thereof," gives the whole of the testator's property absolutely to a person to whom nothing was given by the will, which will disposed of the whole of the testator's estate, real and personal.

It is to be observed that Ellen Hankey, the only particular legatee mentioned in the will, had died before the making of the codicil, which, I repeat, is dated within less than two years after the will, and that his granddaughter yet living, for whose temporal welfare and spiritual condition the will evinces such careful solicitude, was at the making of the codicil still a minor and unmarried. Adverting to these circumstances, to the relative positions of the testator and the appellant, and to the mention of legacy duty and his wages, which the codicil contains, I am, *omni considerata scriptura*, not convinced, I am not persuaded, that by it the testator meant to give or has given to the appellant more than
 * 377 * the testator's "household goods and furniture, linen, china, watches," and effects *eiusdem generis*.

I find myself, therefore, unable to join in any order on this occasion which shall proceed on a construction of the codicil varying from that of the Vice-Chancellor as to the real estate.

The question is different whether it is better to leave the decree exactly in the present shape. For instance, it may possibly be as well to dismiss the bill against the appellant wholly or in part, so as to free him altogether or to some extent from the suit; it may possibly be right to enable him, if he is not now able, to claim the real estate in an action. It may possibly be proper that the decree

¹ It is a well-established position, that devises and legacies in a will may receive a character by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise; and this because the sole duty of the Court, in giving a construction, is to ascertain the real intent and meaning of the testator. PARKER C. J., in *Cook v. Holmes*, 11 Mass. 531.

should extend to give an account or relief as to personal estate specifically bequeathed, on the supposition that any has been so bequeathed; and if the counsel on either side shall be desirous of saying any thing as to the decree otherwise than on the mere point of the interpretation of the codicil as to the real estate, the point which alone, unless I mistake, was argued or fully argued here, I shall have not the least objection to hear them.

THE LORD JUSTICE TURNER. — The question to be determined upon this appeal depends entirely upon the construction to be put upon the codicil to the will of the testator; and looking to the anxious dispositions in favour of his granddaughter which the testator has made by his will, I should have been glad if I could have brought my mind to the conclusion at which the Vice-Chancellor of the duchy and my learned brother have arrived, that the real estate of the testator is not affected by the codicil; but after repeatedly * considering these instruments my opinion * 378 is, that the codicil has operated to revoke the will as to the real estate, and has well disposed of it in favour of Joseph Rowe. I think that the words of the codicil are too strong to be surmounted. [His Lordship read them.]

Observations were made in the course of the argument upon the introductory words of the disposition, "I give and bequeath," the word "give" being superadded to the word "bequeath," which is peculiarly applicable to personal estate; but in an instrument of this character I think we should not be justified in ascribing any force or effect to these mere introductory words. The reasons which have led me to the conclusion at which I have arrived are these: I think that the words "all my household goods and furniture, linen, china, watches, and all other my personal property and effects that I may be possessed of at the time of my death," ought to be construed to include all the personal estate. I see no context by which the effect of these words can be cut down. The subsequent directions, that the dispositions are to be free from control and free from legacy duty, and are not to prejudice the claim for wages, may possibly mean that the executors are to pay the legacy duty, and are not further to interfere with the legatee, and that if the estate should be insufficient, the claim for wages is to subsist. But whether this be the meaning or not, I do not see how these dispositions furnish any limit to the previous bequest. I think,

therefore, that the codicil disposes of the whole personal estate, and that this being so there is nothing on which the words "all my estate" can operate, except the real estate, and that that estate consequently passes by it.

* 379 This conclusion is, I think, fortified by the language * of the codicil, in which the testator has, I think, plainly spoken of all his estate as something distinct from his personal estate, and also by the circumstance that in the clause of the will by which the testator has authorized his executors to appoint a collector, he has expressed himself in these terms: "and I direct that my said trustees, or the trustees or trustee for the time being, shall and may employ a competent person as agent and collector of the rents of my estates," thus using the words "my estates" as applicable to his real estates.

Upon these grounds I have found myself unable to agree in opinion with the Vice-Chancellor of the duchy in this case; but as my learned brother's opinion concurs with that of the Vice-Chancellor, the decree must of course be affirmed.

* 380 *In the Matter of The BIRKENHEAD, LANCASHIRE,
AND CHESHIRE JUNCTION RAILWAY ACTS; and

In the Matter of The LANDS CLAUSES CONSOLIDATION
ACT, 1845.

Ex parte The Incumbent of GULDEN SUTTON.

1856. May 30. Before the LORDS JUSTICES.

An order made under the Lands Clauses Consolidation Act directed the dividends of stock arising from the investment of the purchase-money of land taken by a railway company to be paid to the incumbent of a parish for the time being, but only provided for the payment of the costs of the then incumbent of the application on which the order was made. A subsequent incumbent executed a power authorizing an attorney to receive the dividends for him under the order, and filed affidavits showing himself to be the incumbent. On the company declining to pay his costs thus incurred, he applied in chambers

for an order for their taxation and payment, which was ordered accordingly: *Held*, on the appeal of the company, that the order was rightly made.¹

THIS was a motion on behalf of the Birkenhead, Lancashire, and Cheshire Junction Railway Company, by way of appeal from an order of Vice-Chancellor STUART directing payment by the appellants of certain costs of the respondent the Rev. G. A. Perryn, the incumbent of Guilden Sutton.

On the 10th of July, 1851, an order was made under the company's Acts and the Lands Clauses Consolidation Act for the investment of 320*l.* (being the purchase-money of land taken by the company) in 3*l.* per cent annuities, to be carried to an account intituled "The Account of the Incumbent of the Perpetual Curacy of Guilden Sutton, in the County of Chester, and of the Rector of St. Bridgetts, in the City of Chester," and it was ordered that one moiety of the dividends should be paid to the Rev. P. W. Hamilton during such time as he should continue to be the incumbent of the perpetual curacy of Guilden Sutton, and to his successors the incumbents of the said curacy for the time being, and that the other moiety should be paid in the same way to the then rector of St. Bridgetts and his successors; and it * was * 381 ordered, that the company should pay the then perpetual curate and rector (on whose petition the order was made) their costs of the purchase or taking of the land by the company, or which had been incurred in consequence thereof, other than such costs as were by the Lands Clauses Consolidation Act otherwise provided for, and of the investment of the money in bank annuities, and of obtaining the order now in statement, and of all proceedings relating thereto.

The costs thus directed to be taxed and paid, including the expense of a power of attorney from the then petitioners to their London bankers to enable them to receive the dividends, were ascertained and agreed to between the parties at 23*l.*, and were paid by the company.

In April, 1854, Mr. Hamilton died, and the respondent was appointed his successor as perpetual curate of Guilden Sutton. In October, 1854, the respondent obtained a power of attorney to enable his bankers in London to receive his moiety of the dividends, and his solicitor sent to the company a bill of the costs

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1823.

incurred in obtaining this power of attorney and those of the affidavit necessary to verify the respondent's title and amounting in all to 7*l.* 19*s.* 10*d.* The company having declined to pay the amount, the respondent obtained a warrant for taxation. The taxing master having declined to tax the costs without an order, an application was made to the Vice-Chancellor by summons in chambers, and on this application the order under appeal was made, referring it to the taxing master in case the parties differed to tax the respondent his costs of and including therein his reasonable charges and expenses of obtaining payment of the dividends on one moiety of 330*l.* 6*s.* 8*d.* bank 3*l.* per cent

* 382 annuities invested in * pursuance of the order made in the above matter and dated the 10th day of July, 1851, and directing payment of these costs by the appellants.

Mr. Dart, for the company, in support of the appeal. — The Vice-Chancellor had no jurisdiction to make the order in chambers. But if there was jurisdiction, the order is erroneous, as such costs as were directed to be taxed and paid were not within the Act.

He referred to the 70th section of the Lands Clauses Act, and to *Ex parte Althorpe*, (a) *Re Hodges*, (b) *Re Rye's Trusts*. (c)

Mr. Charles Hall, for the respondent. — The 70th section of the Lands Clauses Act does not apply to the case, and the section which directs payment of costs does not prescribe any particular mode of obtaining an order for their payment. The application at chambers was therefore not improper, and the order made upon it was correct. 15 & 16 Vict. c. 80, §§ 13, 26. The expenses here claimed are "reasonable charges and expenses" within the 80th section of the Lands Clauses Act, and particularly within the words of that section, "all proceedings relating thereto."

Mr Dart replied.

Their Lordships held that the order was right, and dismissed the appeal with costs.

(a) 3 Y. & C. 396. (b) 4 De G., M. & G. 491. (c) 1 Jur. N. S. 222.

* WHITBREAD v. LYALL.

* 383

1856. June 4. Before the LORDS JUSTICES.

In a foreclosure suit against puisne mortgagees and the mortgagor, an order must be made foreclosing the former absolutely, before proceeding to foreclose the mortgagor.

THIS was an appeal from the decision of Vice-Chancellor STUART, refusing to make an order foreclosing absolutely and at once puisne incumbrancers and a mortgagor.

The suit was instituted by a mortgagee against the puisne incumbrancers and the mortgagor, and the former having made default in the payment prescribed by a decree for foreclosure, the chief clerk proceeded to take the usual further account against the mortgagor, and to appoint a time for him to redeem, but no order had been made for foreclosing the puisne incumbrancers absolutely. The mortgagor made default, and the plaintiff applied for one order foreclosing both the puisne incumbrancers and the mortgagor.

The Vice-Chancellor refused the application, which was then renewed before their Lordships, who desired that the opinion of the registrars as to the practice might be obtained.

The following case was accordingly submitted to the registrars:—

“ A certificate by the registrars is required as to the practice of the Court in the following case: The plaintiffs, as first incumbrancers, filed their bill to foreclose the defendants Glenn and others, the second incumbrancers, and the defendant Lyall the mortgagor. By the decree dated the 30th of January, 1855, it was ordered that the defendants, Glenn and others, should redeem the plaintiffs or be foreclosed, and in case of *such *384 foreclosure that subsequent interest should be computed on the plaintiffs' mortgage and their subsequent costs taxed, and that the defendant Lyall should redeem the plaintiffs or be foreclosed. The chief clerk appointed the 9th of November, 1855, for the defendants Glenn and others to redeem the plaintiffs. The defendants Glenn and others made default in payment at the time

appointed. The plaintiffs did not obtain the final order to foreclose the defendants Glenn and others absolutely, nevertheless the chief clerk proceeded to take an account of what was due to the plaintiffs for subsequent interests and costs, and appointed the 12th of March, 1856, for the defendant Lyall, the mortgagor, to redeem the plaintiffs. The summons to proceed with these accounts was served on the mortgagor. The defendant Lyall also made default in payment. The plaintiffs then applied for one order to foreclose the second incumbrancers and the mortgagor. The Court granted an order to foreclose the second incumbrancers only and refused to foreclose the mortgagor, considering the application for that purpose irregular. The question is, whether an order to foreclose the second incumbrancers absolutely ought to have been obtained previously to the chief clerk proceeding to take an account of subsequent interest and costs due to the plaintiffs, and to appoint a time for the mortgagor to redeem the plaintiffs."

Ten of the registrars certified as follows :—

"The undersigned are of opinion, that an order to foreclose the second incumbrancers absolutely ought to have been obtained before proceeding to foreclose the mortgagor."

Another registrar signed the following separate certificate :—

* 385 "The undersigned are of opinion that it was not * necessary to obtain such order before proceeding to foreclose the mortgagor, and that one order might be granted after the mortgagor had made default to foreclose the second incumbrancers and the mortgagor."

Their Lordships agreed with the certificate of the ten registrars and refused the application.

GRAINGER v. SLINGSBY.¹

1856. June 9, 10. Before the LORDS JUSTICES.

Bequest in these terms by a testatrix having, among other property, government securities and bank stock, — “the whole of my fortune now standing in the funds:” *Held*, not *falsa demonstratio*, nor to extend to the bank stock, but to be restricted to the government securities.²

On an appeal of a defendant from the whole decree, except as to costs, he is entitled to begin.³

THIS was an appeal by Emma Slingsby from the decision of Vice-Chancellor STUART upon the construction of the will of Catherine Fox, dated the 21st of February, 1837, whereby she appointed her brother, Edward Buckley Fox, her executor, and after bequeathing divers pecuniary legacies, and an annuity of 60*l.* a year, gave as follows:—

“To my dear brother Edward I leave every thing I may be possessed of at my decease for his life, and should he marry and have children of his own, to those children after; but, should he die a bachelor, at his death I leave the whole of my fortune now standing in the funds to Emma Slingsby, my god-daughter. Plate, linen, furniture, books, &c., I leave to my brother Edward for ever, and after my funeral expenses are paid, and the legacies, out of the money he has of mine in his hands, the remainder to be his for ever, and no question asked what the sum may be.”

The residue of the personal estate of the testatrix consisted (in addition to plate, linen, furniture, and books) of 13,333*l.* 6*s.*

8*d.* 3*l.* per cent consolidated bank annuities, * 2767*l.* 4*s.* * 386

8*d.* 3*l.* 5*s.* per cent reduced annuities, 1313*l.* 14*s.* 2*d.*

new 3*l.* 5*s.* per cent annuities, 1500*l.* 3*l.* per cent reduced annuities, and 5833*l.* 6*s.* 8*d.* bank stock.

Edward Buckley Fox under the provisions of the will received

¹ S. C., 7 H. L. Cas. 273; 28 L. J. Ch. 616.

² See the rule stated, 1 Jarman Wills (3d Eng. ed.), 751, 753; see also Foote, Appellant, &c., 22 Pick. 299.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1484, 1485, and notes.

during his life the dividends and income accruing due on bank stock and the several sums of bank annuities, and he died a bachelor on the 25th of December, 1854, having first by his will, dated the 28th of January, 1837, appointed the plaintiffs his executors.

The question was whether the 5833*l.* 6*s.* 8*d.* bank stock passed under the words "the whole of my fortune now standing in the funds."

The bill prayed a declaration as to the rights and interests of the plaintiffs and the defendant in the bank stock.

The Vice-Chancellor made a decree in favour of the plaintiffs, and the appeal was from the whole decree, except the part providing for the payment of costs.

Mr. Wigram and *Mr. Wickens*, for the appellant.

Mr. Malins and *Mr. Osborne*, for the plaintiffs, contended that as the appeal was from the whole decree, except as regarded costs, the plaintiffs had the right to begin.

Their Lordships held that the appellant was entitled to begin.

Mr. Wigram and *Mr. Wickens*, for the appellant. — Where *387 a testatrix shows that she intends to deal with *all her property, the Court will construe the will so as to avoid intestacy. The leaning of the Court is against intestacy, and against holding legacies to be specific where the intention is doubtful.

They referred to *Kerr v. The Middlesex Hospital*, (a) *Mills v. Mills*, (b) *Goodtitle v. Southern*, (c) *Down v. Down*, (d) *Waite v. Combes*. (e)

Mr. Malins and *Mr. Osborne*, for the respondents.

They referred to *Trafford v. Boehm*, (g) *Ridge v. Newton*, (h) *Burnie v. Getting*, (i) *Boys v. Morgan*. (k)

(a) 2 De G., M. & G. 576.

(b) 7 Sim. 501.

(c) 1 Mau. & S. 299.

(d) 7 Taunt. 343.

(e) 5 De G. & Sm. 676.

(g) 3 Atk. 444.

(h) 2 Dr. & War. 239.

(i) 2 Coll. 324.

(k) 3 Myl. & Cr. 661.

THE LORD JUSTICE KNIGHT BRUCE. — The first question in this case is with respect to the meaning of the expression “the funds” as used in the will, supposing it not to be enlarged, restrained, or varied by the context. I apprehend that, viewing it as not enlarged, restrained, or varied by the context, it must be taken as meaning only what are commonly called government securities, that is securities guaranteed by the government and forming part of the national debt.

The next question is, whether there is any thing in the context to qualify or affect the meaning of the expression, and I have looked in vain for any such qualification.

The only question remaining is whether the words “now standing in the funds” are only a *falsa demonstratio*, * or * 388 whether they have the effect of restricting those which precede them. If the true view is that the testatrix gave the whole of her property, and that the insertion of the words “standing in the funds” was an “error of demonstration,” as it has been called, the error may be immaterial. But, though I may regret it, I feel bound to say, that, in my opinion, the construction according to which the expression was held to be one of limitation, and not of erroneous demonstration, is, to say the least, as probable as the contrary construction; and, this being so, the title of the sole next of kin must prevail. The decree, therefore, cannot, I think, be disturbed.

THE LORD JUSTICE TURNER. — This case involves two points: first, whether the gift to the appellant of the “whole fortune” of the testatrix is to be taken in the sense of a gift of the whole of her property, rejecting the words “standing in the funds” as an erroneous description; and secondly, if not, whether the bank stock passes under the gift of the testatrix’s “fortune standing in the funds.” As to the first question, I think that the view most favourable to the appellant is to suppose that the subsequent bequests of the plate, furniture, &c., and of the money, are entirely independent of the previous disposition. Assuming it to be so there was a gift of all the testatrix’s property to her brother, and then to his children, if any.

The question then arises whether in this view of the will there is an intention shown to give to the appellant every thing which the brother, and his children, if he had any, would have taken, in

fact to put the appellant in the same position as the brother's
* 389 children. I think that * we cannot judicially arrive at that conclusion. The testatrix has shown that she knew how to express herself distinctly when she intended to give all her property, and there is a marked contrast between the expressions used in the gift to the brother and those used in the gift to the appellant. There is a contrast between the words "every thing I may be possessed of" in the one case, and "my fortune" in the other case, between the words "at my death" in the one case, and "now standing" in the other case. With every inclination, therefore, to hold all the property given to the brother and his children to be included in the gift to the appellant, as it is impossible not to suspect that the testatrix so intended, I cannot justify myself in holding that there is any such intention expressed by the will.

The next question is, whether the bank stock passes under the description of "my fortune now standing in the funds." I think that the words "the funds" must be held to mean "the public funds," and not to apply to the funds of a trading company like the Bank of England. I happen to have seen an opinion of the late Mr. Justice BOSANQUET in a case which was submitted to him when at the bar upon this point. That learned Judge gave an elaborate opinion, to the effect that bank stock was not included in the term "public funds," considering that the interest of a proprietor of bank stock was not a share of the moneys paid by government to the bank, but of the general profits of the bank, and also observing on the fact that in the stamp Acts a distinction had always been taken between bank stock and government annuities. I am of opinion, therefore, that the word "funds" does not include bank stock. If the testatrix had been possessed of no property which answered the description of her fortune in the funds,
the bank stock might have passed as most nearly answering
* 390 that description, * but as she had property correctly answering the description, I cannot see my way to depart from the strict construction of the words she has used.

The appeal must, therefore, be dismissed.

In the Matter of SAUMAREZ, a Lunatic ; and

In the Matter of CARTERET'S SETTLEMENT ; and

In the Matter of The TRUSTEE ACT, 1850.

1856. June 23. Before the LORDS JUSTICES.

A petition for an order vesting in new trustees property of which a trustee has become lunatic ought to be served on his committee.

THIS was a petition praying that the proper officer of the Bank of England might join with a continuing trustee under a settlement in transferring a trust fund to the continuing trustee and new trustees appointed under a power in the settlement in the place of deceased trustees and of the above lunatic, who had been so found by inquisition. The registrar in lunacy had required the committee to be served before drawing up the order.

Mr. R. Pryor, in support of the petition, submitted that the practice had never been to serve the committee, any more than it had been to serve a trustee of unsound mind not so found by inquisition, or an infant trustee, or a trustee abroad, or the executors of a deceased trustee.

The Lord Justice TURNER suggested, that as the trustee might have acted he might have some claims, and their Lordships held that the committee ought to be served.

* LADY LANGDALE v. BRIGGS.

* 391

1856. May 22, 23, 24, 26, 27. June 26. Before the LORDS JUSTICES.

A testator was, under a deed of re-settlement of his family estates, entitled to a reversion in fee, subject to an estate for life in his only son, who was a bachelor, and to remainders in tail to the first and other sons of that son. The testator soon afterwards devised all his real estates to his eldest daughter for her life, with remainder to her first and other sons in tail, with remainders to his other daughters for life and to their sons in like manner. The

will contained a name and arms clause determining the estate of any person who should become "entitled to the possession or to the receipt of the rents and profits" of the estates, and not assume the family name and arms within a year after becoming so entitled. In several other parts of the will, provisions were made respecting persons who, by virtue of the will, should be in the "actual possession" of the property or "entitled to the rents and profits thereof." The son died without issue two years after the testator, and the first tenant for life under the will assumed the name and arms of H. within a year after her brother's death: *Held*, that there was no forfeiture, either as to the family estates, or as to property to which the testator had become entitled in fee-simple in possession after the date of the will.

The Court will not make declarations of future rights in events which have not happened, and, therefore, where a testator having by his will given copyholds and leaseholds to trustees upon trusts to correspond with the uses of the devised freeholds, and by a codicil limited the freeholds differently after the death of the first tenant for life, but was silent as to copyholds or leaseholds: *Held*, by Lord Justice TURNER, that during the continuance of the life-estate the Court would not determine how far the ulterior limitations of the copyholds and leaseholds were affected by the codicil.¹

Where a testator after the date of his will became entitled to the personal estate of a deceased sister, as one of her next of kin: *Held*, that under the Wills Act, leaseholds forming part of the sister's general estate passed under a specific bequest of the testator's leasehold property.²

A testator had, after mortgaging an estate, settled it subject to the mortgage upon trusts for himself for life, with remainders over, leaving in himself the ultimate reversion in fee, which he devised by his will (before the passing of the 17 & 18 Vict. c. 113): *Held*, that his general personal estate ought to be exonerated from the mortgage debt.³

THESE were appeals from decisions of Vice-Chancellor STUART upon the construction of the will and codicils of Edward Earl of Oxford.

¹ See as to the declaration of future rights, 2 Dan. Ch. Pr. (4th Am. ed.) 1001; 3 *ib.* 218, note (1); *Rooke v. Kensington*, 2 K. & J. 753; *Bristow v. Whitmore*, 4 K. & J. 743; *Baylies v. Payson*, 5 Allen, 473; *Jackson v. Turnley*, 1 Drew. 617; *Cross v. De Valle*, 1 Wallace U. S. 1; *Bowers v. Smith*, 10 Paige, 200; *Gosling v. Gosling*, Johns. 265; *Bell v. Cade*, 2 J. & H. 122.

² See *Cole v. Scott*, 1 Mac. & G. 518 and notes; *Wait v. Belding*, 24 Pick. 186; 1 *Jarman Wills* (4th Am. ed.), 305, and note (1), and cases cited; *Loveren v. Lamprey*, 22 N. H. 442; *Foote, Appellant, &c.*, 22 Pick. 302. So the validity and construction of a will depend upon the law as it stands at the death of the testator. *Wakefield v. Phelps*, 37 N. H. 295; *Loveren v. Lamprey*, 22 N. H. 434; *Castle v. Fox*, L. R. 11 Eq. 542; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229.

³ See 2 *Jarman Wills* (3d Eng. ed.), 597 *et seq.*, (4th Am. ed.) 397 *et seq.*; *Hewes v. Dehon*, 3 Gray, 205; *Sugden V. & P.* (14th Eng. ed.) 195; *Andrews v. Bishop*, 5 Allen, 490; *Rogers v. Rogers*, 1 Paige, 188.

At the time of making his will and of his death, the testator had no freehold, copyhold, or leasehold property except such estate as he had under a settlement dated the 20th of March, 1832, and made between the testator of the first part, Alfred Lord Harley, his only son, of the second part, John Moore of the third part, and Thomas * Briggs of the fourth part, after reciting * 392 among other things that it had been agreed between the testator and Alfred Lord Harley that both the family estates and certain estates then vested in Moore should, subject to the mortgages to be made under the authorities of a deed of the 28th of August, 1830, and to such then present and subsisting mortgages as should not be paid off, be conveyed to trustees upon the trusts thereafter declared, it was declared, that Briggs and Moore respectively should, subject to the trusts and powers contained in certain deeds of the 28th of August, 1830, and the 26th of March, 1831, and the indenture now in statement, and to the mortgages and incumbrances created by virtue thereof, convey all the premises vested in them respectively to trustees in trust for the testator for his life, with remainder in trust for Alfred Lord Harley for life, with remainder in trust for the first and other sons of Lord Harley successively in tail male, with remainder in trust for the sons of the testator by any future wife in tail male, with remainder in trust for the testator in fee ; and some copyhold and leasehold estates were at the same time settled upon trusts corresponding with those of the freehold estates.

The mortgages referred to in this deed had been created by the testator himself.

The testator, by his will, dated the 19th of March, 1835, gave and devised all the freehold manors, messuages, lands, tenements, and hereditaments of or to which he or any other person or persons in trust for him was or were seised or entitled in fee-simple, in possession, reversion, or remainder, or which by virtue of any special power he was enabled to appoint or dispose of by his will (subject to the charges and incumbrances and prior estates and interests to which the same or any of them * may be * 393 subject at the time of his decease) to the uses, upon and for the trusts, intents, and purposes and with, under, and subject to the powers, provisos, and declarations thereafter expressed and contained of and concerning the same (that was to say) to the use of Thomas Briggs and Thomas Carter Briggs, their executors,

administrators, and assigns for 500 years from the time of the testator's decease, without impeachment of waste, upon the trusts thereafter declared, and from and immediately after the expiration or other sooner determination of the same term and in the mean time subject thereto and to the trusts thereof, to the use of the testator's eldest daughter Lady Jane Elizabeth Harley and her assigns during her life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and every other son of Lady Jane Elizabeth Harley successively in tail male, with remainder to the use of the testator's youngest daughter Lady Frances Harley and her assigns during her life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and every other son of Lady Frances Harley successively in tail male, to the use of Thomas Briggs and Thomas Carter Briggs, their heirs and assigns, during the life of the testator's second daughter Lady Charlotte Mary Bacon, the wife of General Anthony Bacon, upon trust to preserve contingent remainders, and upon trust during the joint lives of General and Lady Charlotte Mary Bacon to pay the rents and profits to the separate use of Lady Charlotte Mary Bacon without power of anticipation, and if her husband died in her lifetime, then in trust for Lady Charlotte Mary Bacon and her assigns during the then remainder of her life, and immediately after her decease, whether she survived her husband or not, the said hereditaments

were to remain and be to the use of the first and every
 * 394 other son of Lady Charlotte * Mary Bacon severally in tail male, with remainder to the use of the testator's third daughter Lady Anne Harley and her assigns for her life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and every other son of Lady Anne Harley successively in tail male, and in default of such issue to the use of the testator's own right heirs for ever.

And the will contained the following name and arms clause: "Provided always, and I do hereby declare, that every person who, by virtue of the limitations hereinbefore contained or of this proviso, shall become entitled to the possession or to the receipt of the rents and profits of the manors, hereditaments, and premises hereinbefore devised, and who shall then not use the surname of Harley, and bear the arms of Harley, shall and do within the space of one year next after she or he shall so become entitled as afore-

said, and also every person whom any female so becoming entitled as aforesaid hath married or shall marry, shall and do if such female shall be married at the time of her becoming so entitled as aforesaid within the space of one year next after she shall become entitled as aforesaid, but if such female shall not be married at the time of becoming so entitled as aforesaid, but shall afterwards marry, then within the space of one year next after the solemnization of such marriage, take upon herself and himself and use in all deeds and writings whereto or wherein she or he shall or may be party, and upon all other occasions, the name of Harley and no other surname, and also shall and do bear the arms of Harley and no other arms, and shall and do within the said space of one year apply for and endeavour to obtain an Act of Parliament or proper license from the Crown, or take such means as may be requisite and proper to enable or authorize her or him to take the surname and * bear the arms of Harley. And I do hereby * 395 further declare, that in case any such person or persons shall neglect or refuse within the said space of one year to take, use, and bear such surname and arms, or to take such proper steps and means as may be requisite to enable and authorize her, him, or them so to do, or shall at any time afterwards discontinue to use and bear such surname and arms, then and in every such case immediately after the expiration of the said space of one year, or upon such discontinuance as aforesaid (as the case may be), if the person who or whose husband shall so for the time being neglect, refuse, or discontinue as aforesaid shall, under the limitations hereinbefore contained, be either by herself or together with her husband a tenant for life, the limitations hereinbefore contained to the use of, or in trust for, such person and her assigns during her life shall absolutely cease and determine, and the manors, hereditaments, and premises of which the person who or whose husband shall so for the time being neglect, refuse, or discontinue, shall either by herself, or together with her husband, be tenant for life under the limitations hereinbefore contained, shall immediately thereupon go to the person or persons next in remainder under the said limitations, precisely in the same manner as if the person who or whose husband shall so for the time being neglect, refuse, or discontinue were then actually dead, subject nevertheless to the use or estates or uses or estates (if any) which may have been previously limited in exercise of the power of leasing hereinafter

contained ; and if the person who shall so for the time being neglect, refuse, or discontinue as aforesaid shall under the limitations, hereinbefore contained be tenant in tail male, then the limitation under which the person who shall neglect, refuse, or discontinue shall be tenant in tail male shall absolutely cease and determine,

and the manors, hereditaments, and premises of which the * 396 person who shall so for the time being * neglect, refuse, or discontinue shall be tenant in tail male under the limitations hereinbefore contained shall immediately thereupon go to

the person or persons next in remainder under the said limitations, precisely in the same manner as if the person who shall so for the time being neglect, refuse, or discontinue were then actually dead without issue entitled or inheritable under the limitation which shall so cease, subject nevertheless to the use or estate, or uses or estates, if any, which may have been previously limited in exercise of the power of leasing hereinafter contained : Provided always and I do hereby declare, that if at any time there shall at any time, by reason of the expiration, failure, cesser, or determination of any of the previous uses or estates hereinbefore limited, be a suspense or contingency of the then next immediate expectant remainder, then and in every such case, and so often as the same shall happen, the manors, hereditaments, and premises in respect of which any previous use or estate shall so for the time being expire, fail, cease, or determine, shall be and remain to the use of the said Thomas Briggs and Thomas Carter Briggs, their heirs and assigns, during every such suspense or contingency as aforesaid, in trust by the usual means to preserve the contingent uses and estates hereinbefore limited from being destroyed, and upon this further trust to receive the rents and profits of the said manors, hereditaments, and premises, and pay the same to the person or persons then for the time being entitled to the first vested estate in the said manors, hereditaments, and premises : Provided nevertheless, that if the persons or person entitled to the first vested estate shall be the person to whose use the said manors, hereditaments, and premises are hereinbefore limited during the life of the said Lady Charlotte Mary Bacon, or their assigns, or the survivor of them, or the heirs or assigns of such survivor, then and in such case the rents

* 397 and profits which during the period of suspense * or contingency shall arise from the said manors, hereditaments, and premises or so much of such period as the said Lady Charlotte

Mary Bacon shall be living, be applied and disposed of upon and for the same trusts, intents, and purposes in favour or for the benefit of the said Lady Charlotte Mary Bacon, but while under her present coverture, with, under, and subject to the same powers, conditions, and restrictions as are hereinbefore expressed and declared of and concerning the rents and profits of the said manors, hereditaments, and premises during the life of the said Lady Charlotte Mary Bacon: Provided always, and I do hereby further declare, that if any person who, under the provision hereinbefore contained, shall for the time being be required to take and use the surname of Harley and to bear the arms of Harley shall, at the time when he ought so to do be under the age of twenty-one years, then and in every such case he shall be at liberty to postpone the time of taking, using, and bearing such surname and arms to the end of twelve calendar months after he shall have attained the age of twenty-one years."

There was then a direction for the accumulation of rents during the minorities of tenants in tail, when entitled under the limitations thereinbefore contained "to the possession or to the receipt of the rents and profits" of the manors, hereditaments, and premises thereinbefore devised. After limiting a term of five hundred years, and declaring the trusts of it, which provided against a deficiency of the personal estate for the payment of debts and legacies, the will proceeded to give powers of leasing, sale, and exchange, which were referred to in the arguments and judgment as throwing light on the name and arms clause by the contrast between the language of it and of these provisions. They were thus framed:—

"Provided always, and I do hereby further declare, * that * 398 it shall be lawful for each of my said daughters, when by virtue of this my will she shall be in the actual possession of the manors, hereditaments, and premises hereinbefore devised, or entitled to the rents and profits thereof, and if a *feme covert* notwithstanding her coverture, and during the minority of the son of any one of my said daughters when by virtue of this my will such son shall be in the actual possession of the said manors, hereditaments, and premises, or entitled to the rents and profits thereof, for the said Thomas Briggs and Thomas Carter Briggs, or the

survivor of them, or the executors or administrators of such survivor, at their or his discretion, by any deed or deeds, writing or writings to be sealed and delivered by her or them respectively in the presence of and attested by two or more witnesses, to devise and lease the said manors, hereditaments, and premises hereinbefore devised or any of them or any part thereof to any person or persons, for any term or terms of years not exceeding twenty-one years to be computed from the making thereof, at the best yearly rent or rents that can be reasonably gotten for the same, without taking any fine or premium for the making thereof, but so that there be contained in every such demise or lease a condition of re-entry for non-payment of the rent or rents thereby to be reserved for the space of twenty-one days next after the same shall become due and payable, and so that the lessee or lessees be not made punishable for waste, and so that he, she, or they execute a counterpart or counterparts thereof, and thereby covenant for the payment of the rent or rents thereby to be respectively reserved: Provided always, and I do hereby further declare, that it shall be lawful for the said Thomas Briggs and Thomas Carter Briggs, and the survivor of them, and the executors or administrators of such survivor, at the request of my daughter who by virtue of this my will shall be in the actual possession of the manors, hereditaments, * 399 and premises * hereinbefore devised, or entitled to the rents and profits thereof, and if a *feme covert* notwithstanding her coverture, every such request to be testified by some writing under the hand of the daughter for the time being making the same, and also during the minority of any son of any one of my said daughters when by virtue of my will such son shall be in the actual possession of the said manors, hereditaments, and premises, or entitled to the rents and profits thereof, for the said Thomas Briggs and Thomas Carter Briggs or the survivor of them, or the executors or administrators of such survivor, at their or his discretion, to dispose of, either by way of absolute sale or in exchange for other lands and hereditaments in England or Wales, all or any or any part of the said manors, hereditaments, and premises, and the inheritance thereof, for such price or prices, or for such equivalent in other lands and hereditaments, as to the said Thomas Briggs and Thomas Carter Briggs, or the survivor of them or the executors or administrators of such survivor, shall seem reasonable."

After providing for the reinvestment of the proceeds of sales in the purchase of other hereditaments, the clause proceeded thus :—

“ So that every such purchase be approved of in writing by and under the hand of the person who would for the time being be entitled under this my will to the possession or to the receipt of the rents and profits thereof if the same were then actually purchased and settled, if such persons shall have attained the full age of twenty-one years, but if such person shall be under the age of twenty-one years, then every such purchase shall be made at the discretion of the said Thomas Briggs and Thomas Carter Briggs, or the survivor of them, or the executors or administrators of such survivor.”

* And the testator devised all the copyhold or customary * 400 messuages, lands, tenements, and hereditaments whatsoever and wheresoever of or to which he or any other person or persons in trust for him was or were seised or entitled for an estate of inheritance in possession, reversion, or remainder, or which by virtue of any special power the testator was enabled to appoint or dispose of by will, to the said Thomas Briggs and Thomas Carter Briggs, their heirs and assigns, subject to the charges and incumbrances and prior estates and interests to which the same, or any of them, might be subject at the time of the testator's decease, but nevertheless upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, and declarations, as, regard being had to the different natures of the respective properties, would best or nearest correspond with the uses, trusts, intents, purposes, powers, provisos, and declarations hereinbefore expressed and contained of and concerning the freehold manors, hereditaments, and premises thereinbefore devised.

And he gave and devised all his leasehold messuages, lands, tenements, tithes, and hereditaments, whatsoever and wheresoever, with their appurtenances, unto the said Thomas Briggs and Thomas Carter Briggs, their executors, administrators, and assigns, for the respective estates, terms, and interests which the testator should have therein at the time of his decease, subject to the rents and covenants respectively reserved and contained in the leases of the said leasehold premises which should be subsisting at the time of

his decease, and to be respectively reserved and contained in the renewed leases of the same premises, or any of them, and which from time to time ought to be paid, observed, and performed on the part of the lessees, and also subject to the charges, incumbrances, * 401 estates, and interests to which the * same might be subject, upon trust that when and so often as the usual time for the renewal of any of the said leasehold premises which had been usually renewable should arrive to use their or his utmost endeavours to renew the subsisting lease or leases of the said premises; and in order thereto should form an accumulating fund by laying out and investing in their or his names or name for the period of twenty-one years after the testator's decease, and after that period during such time or respective times as any son of any one of the testator's said daughters should for the time being be entitled under the trusts thereafter declared to the "actual possession or to the receipt of the rents and profits of the leasehold premises" which had been usually renewable and should be under the age of twenty-one years, in any of the parliamentary stocks or public funds of Great Britain such portion as therein mentioned of the net rents and profits of the leasehold premises which had been usually renewable, to raise a renewal fund.

And the testator thereby declared, that subject to the trusts thereinbefore declared, the leasehold hereditaments thereinbefore given should be held upon such trusts as would best or nearest correspond with the uses thereby declared concerning the freehold hereditaments: Provided nevertheless, that for the effect or purpose of transmission the said leasehold premises should not vest absolutely in any person, who, under the limitations thereinbefore contained, should be tenant in tail male of the manors, hereditaments, and premises thereinbefore devised, and who should be a son of any one of the testator's daughters, unless or until he should attain twenty-one, or die under that age leaving issue inheritable to his estate tail living at the time of his death, or born in due time after.

* 402 * There was a bequest of all the testator's household goods, plate, linen, glass, china, books, pictures, and furniture of all descriptions in his house at Eywood or elsewhere, to such one of his said daughters as under the will should become "first entitled to the actual possession or to the receipt of the rents

and profits" of the freehold manors, hereditaments, and premises thereinbefore devised.

He bequeathed all the residue of his personal estate and effects whatsoever and wheresoever, but subject to the payment of his just debts, funeral and testamentary expenses, and pecuniary legacies, unto and amongst all such of his said daughters as should be living at his decease, equally to be divided between them, except such one of his daughters as under the will should become "first entitled to the actual possession or to the receipt of the rents and profits" of the freehold hereditaments and premises thereinbefore devised.

Thomas Briggs and Thomas Carter Briggs were appointed executors.

By a codicil, dated the 12th day of May, 1845, after reciting the marriage of the testator's daughter Lady Jane Elizabeth Harley with Lord Langdale, and that there was issue of such marriage one daughter, the Hon. Jane Frances Bickersteth, and after reciting the marriage of Lady Frances Harley with Mr. Henry Vernon Harcourt, and that of Lady Anne Harley with Count St. George, who had since died leaving the said Lady Anne St. George his widow and three children by her him surviving, the testator devised all the freehold manors, messuages, lands, tenements, tithes, and hereditaments, comprised in and devised by his said will, but subject to the charges and incumbrances referred to in the will, and also to all the limitations and trusts declared

*and contained in the will prior to the limitation, to the use * 403 of his said youngest daughter, Lady Frances Harcourt for her life, to the uses in manner following (that was to say), to the use of Miss Bickersteth for her life, with remainder to the use of trustees named in the will in trust to preserve contingent remainders, with remainder to the uses of the first and every other son of Miss Bickersteth successively in tail male, with remainder to the same uses and upon the same trusts in favour and for the benefit of Lady Frances Harcourt and her issue male as were in the said will expressed and declared of and concerning the same, and subject thereto to the use of Lady Langdale, her heirs and assigns for ever. And the testator thereby declared that the proviso, and condition, and limitations, and trusts in his will contained respecting the taking and using the surname and arms of

Harley, and also the powers of leasing, and sale, and exchange, and other powers contained in the will should extend and apply to the limitations contained in the codicil, and to the persons who were to take under those limitations, and that the powers might be exercised precisely as the same would have extended and applied to those limitations and persons respectively, and as the powers might have been exercised if such limitations had been originally inserted in the will in the order in which they were inserted in the codicil, and such proviso, and condition, and limitation, and trusts, and powers, had by the will been originally made to extend and apply to the limitations in the codicil in the order in which they were therein inserted. And as to that portion of the testator's residuary personal estate and effects, which by the will he had given to his daughters Lady Charlotte Mary Bacon and Lady Anne St. George in the event of their surviving him, he thereby revoked

the bequest as to each of them, and gave and bequeathed * 404 such portion to his two daughters, Lady * Langdale and

Lady Frances Harcourt, in equal shares as tenants in common, but if either of his said two last-mentioned daughters should die in his lifetime, then he gave the whole of such portion to the survivor of them. And he thereby ratified and confirmed the will except so far as the same was altered or revoked by the codicil.

The said testator died on the 28th December, 1848, without having married again, leaving his son Alfred Lord Harley, who then became Earl of Oxford, his only son and heir-at-law, and no other issue male, him surviving, and leaving also Lady Langdale (the plaintiff) and the defendants Lady Frances Vernon Harcourt, Lady Charlotte Mary Bacon, and Lady Anne St. George him surviving.

After making the codicil, the testator purchased a freehold estate at Woobley's Ash, and also became entitled to other freehold estates in the counties of Brecon and Radnor, which descended to him as the heir-at-law of a sister named Frances Harley. He was also her sole next of kin, and part of her personal estate consisted of some leasehold property, as to which it had been decided that she died intestate. (a)

Alfred Lord Harley survived his father and succeeded to the

(a) See *Briggs v. Penny*, 3 De G. & Sm. 525; 3 Mac. & G. 546.

title of Lord Oxford. He died without issue, on 19th January, 1858, and on 14th March following, the plaintiff took the name and arms of Harley. The defendant Edward Bacon, who was an infant, was the eldest son of the testator's daughter Lady Charlotte Mary Bacon and entitled to the first estate tail.

The questions were: 1. Whether the plaintiff had not * by * 405 not taking the testator's name and arms within a year after the testator's death, incurred a forfeiture of all the estates or at least of such of them as the testator was entitled to in fee-simple in possession at his death.

2. How far, if at all, the codicil affected the destination of the leaseholds and copyholds after the plaintiff's death, and whether that question could be now decided.

3. Whether the leaseholds of Frances Harley passed under the residuary bequest in the testator's will, or under the specific gift in it of leaseholds.

4. Out of what property the mortgage debts ought to be paid.

Mr. Rolt and *Mr. Walford*, for Edward Bacon, the appellant in one of the appeals. — On the first question the will required the plaintiff to take the name and arms within the prescribed period from the testator's death. The testator had nothing but a reversion, and could not have intended to make actual possession a condition for taking the name and arms. As soon as any tenant was entitled in possession under the limitations the name and arms were to be assumed. The will does not point to the settled estates only. Moreover, the testator himself in his will draws a distinction between "entitled to the possession" and being "in the actual possession." The former expression may, therefore, only mean "entitled to the possession as far as the will is concerned," without reference to the existence of prior estates held under a title paramount. A clause of forfeiture for not taking a name and arms differs from a shifting clause in the event of succession to another estate. The former depends wholly on the intention or caprice of the testator, and the object is to perpetuate his * name. The latter looks to the benefit of the devisee. * 406 Different principles of construction are therefore applicable to the two cases. At all events there must be a forfeiture as to the property to which the testator was entitled in possession.

Hallifax v. Wilson, (a) *Walker v. Main*, (b) *Fazakerly v. Ford*, (c) *Harrison v. Round*. (d)

As to the late Miss Harley's leaseholds, although they were liable to be sold if required for payment of Miss Harley's debts, the executors would have committed a breach of trust by selling leaseholds to pay debts when there was ready money enough to pay them; the leaseholds were in fact not wanted for debts, and never have been sold, they therefore passed by the will as leaseholds. *Attorney-General v. Harley*. (e) *Cawood v. Thompson* (g) and *Shadbolt v. Thornton*, (h) which may be cited against us, are distinguishable from the present case, and the latter is very shortly reported, and appears to have been decided without much argument or consideration. By the 11 Geo. 4, c. 40, an express trust is created.

The codicil did not vary the trusts of the leaseholds and copyholds. *Francis v. Collier*, (i) *Evans v. Evans*, (k) *Williams v. Evans*. (l) The Court has now power to make a prospective declaration. 13 & 14 Vict. c. 35, § 14, and 15 & 16 Vict. c. 86, § 50. At all events it may do so in a case like this, where such a declaration is necessary, for the purpose of apportioning the charges.

On the question of the exoneration of the mortgaged
* 407 property by the personal estate, they referred to and * distinguished *Ibbetson v. Ibbetson*, (m) *Jenkinson v. Harcourt*. (n)

Mr. Elmsley and *Mr. Shapter*, for Lady Frances Vernon Harcourt, the appellant in the other appeal. — *Ibbetson v. Ibbetson* (m) and *Jenkinson v. Harcourt* (n) are entirely in point on the question of exoneration. In *Noel v. Noel*, (o) before the House of Lords on appeal from the decision in *Noel v. Henly*, (p) Lord ELDON said that the question was, whether, supposing the debt to have been originally the testator's, he had not shifted it from the personalty. That is what has been done here.

(a) 16 Ves. 168.

(b) 1 Jac. & W. 1.

(c) 4 Sim. 390; 1 A. & E. 897.

(d) 2 De G., M. & G. 190.

(e) 5 Madd. 321.

(g) 1 Sm. & G. 409.

(h) 17 Sim. 49.

(i) 4 Russ. 331.

(k) 17 Sim. 86.

(l) 1 Ell. & Bl. 727.

(m) 12 Sim. 206.

(n) Kay, 688.

(o) 12 Price, 291.

(p) 7 Price, 241.

As to the late Miss Harley's leaseholds they passed by the residuary gift. *D'Almaine v. Moseley*. (a) They never belonged to the testator as leaseholds during his life, and did not pass by that description in his will. He had only the right to an account of Miss Harley's estate. In *Shadbolt v. Thornton*, (b) where a testator was himself a legatee of residue comprising leaseholds, and gave all his personal estate to charities, it was held that the charities could take the proceeds of the leaseholds. The Statute of Distributions gives to the next of kin "what remaineth clear," and no distribution is to take place till the end of a year, so that it cannot be said till the end of a year whether the next of kin take the leaseholds as leaseholds: *Butler and Baker's Case*; (c) and there is no relation back so as to affect the case: *Doe v. Tofield*, (d) *Bishop of Meath v. Marquis of Winchester*, (e) *Mead v. Lord Orrery*, (g) *Collins v. Doyle*. (h) The testator was never during his life liable to pay rent * or taxes on the * 408 leaseholds. *O'Toole v. Brown* (i) has been misunderstood.

Then again, if the leaseholds pass under the devise of leaseholds, it must be by force of the Wills Act, for they could not have done so before that Act passed. *Coppin v. Fernyhough*, (k) the general expressions not showing any intention to pass after-acquired leaseholds. *Cambridge v. Rous*, (l) *Attorney-General v. Johnstone*, (m) *Easum v. Appleford*, (n) *Page v. Leapingwell*. (o) But the 24th section of the Wills Act does not apply to a specific devise. Moreover, a "contrary intention" appears by the will.

They also referred to *Cole v. Scott*, (p) *Cockran v. Cockran*, (q) *Doe v. Walker*, (r) *Douglas v. Douglas*, (s) *Goodlad v. Burnett*, (t) *Knight v. Davis*. (u)

Mr. Cairns and Mr. Martineau, for Lady Langdale. — As to

(a) 1 Drew. 629.

(b) 17 Sim. 49.

(c) 3 Rep. 36 b.

(d) 11 East, 246.

(e) 4 Cl. & Fin. 445.

(g) 3 Atk. 236.

(h) 1 Russ. 135.

(i) 2 Com. Law, 1701.

(k) 2 Bro. C. C. 291.

(l) 8 Ves. 12.

(m) Ambl. 577.

(n) 5 Myl. & Cr. 62.

(o) 18 Ves. 463.

(p) 1 Mac. & G. 518.

(q) 14 Sim. 248.

(r) 12 M. & W. 591.

(s) Kay, 400.

(t) 1 K. & J. 341.

(u) 3 Myl. & K. 358.

Miss Harley's leaseholds, the words of the 24th section of the Wills Act "as to property comprised in it" "shall speak from the death" must mean for the purpose of ascertaining the property comprised in it. The argument on the other side that you must first ascertain the property according to the old law, and then apply the new law to it, is not a sound construction of the new Act. Moreover for the purpose of this argument the bequest is not specific. It is a bequest of all the testator's leaseholds generally, and adapted, therefore, to comprise those acquired after the date of the will. With respect to the argument that the leaseholds might have been required for payment of Miss Harley's debts, the

case is the same as if they were given subject to the payment * 409 of debts. The legatees in such a case would have an estate, liable only to be defeated if a sale was made for payment of debts, and would have a right to pay the debts and take the leaseholds.

As to making a prospective declaration it could not be done before the Act 13 & 14 Vict. c. 85, nor can it now. *Garlick v. Lawson*. (a) If it could the Court might be constantly called upon to decide questions which might be wholly immaterial in the events that happen. But if such a declaration can be made the cases are in our favour. In *Francis v. Collier* (b) there was no intention manifested to keep the estates together. The decision in *Evans v. Evans*, (c) as to the heir-looms, is in our favour, as are *Carrington v. Payne* (d) and *Darley v. Longworthy*. (e)

With regard to the name and arms clause, the possession meant must be actual possession, otherwise all who took vested estates would have had at once to take the name and arms within twelve months after the testator's death. The word "actual" is in some of the other clauses, it is true, but not in all. As to the estates in possession, the words "or any part thereof" are not inserted. The devisee must be entitled in possession to all before the clause can operate.

They also referred to *Doe d. Luscombe v. Yates*, (g) *Egerton v. Lord Brownlow*, (h) and they asked that the title-deeds of the leaseholds might be given up.

(a) 10 Hare, App. xiv.

(b) 4 Russ. 331.

(c) 17 Sim. 108.

(d) 5 Ves. 404.

(e) 3 Bro. P. C. 359.

(g) 5 B. & A. 544.

(h) 4 H. L. Cas. 1.

Mr. Wigram and *Mr. W. R. Ellis*, for Miss Bickersteth.

* On the question of exoneration they referred to *Ibbetson* *410 v. *Ibbetson*, (a) *Whieldon* v. *Spode*, (b) *Vandeleur* v. *Vandeleur*, (c) and as to Miss Harley's leaseholds, they referred to the cases already mentioned and to *Stokes* v. *Solomons*, (d) *Wright* v. *Rose*, (e) *Sargent* v. *Roberts*, (g) *Knight* v. *Davis*, (h) *Hart* v. *Tulk*. (i)

Mr. Selwyn, for Mr. Bacon and Lady Charlotte Bacon, and

Mr. Speed, for Lady Oxford.

Mr. Toller, for the executors, contended that the title-deeds of the leaseholds ought not to be given up to the tenant for life, but that the executors and trustees ought to keep them, there being no precedent for giving them up to an equitable tenant for life; or that at all events an effectual indemnity ought to be given.

Mr. Rolt replied on one appeal, and *Mr. Elmsley* replied on the other.

Judgment reserved.

June 26.

THE LORD JUSTICE KNIGHT BRUCE. — These appeals have raised various questions of more or less difficulty.

In disposing of them it seems to me convenient to begin with that as to the primary fund for the payment of the two mortgages for 20,000*l.* and 1650*l.* mentioned in the certificate of the chief clerk of the Vice-Chancellor STUART, mortgages, which having been created by Edward Earl of Oxford, the testator in the cause, the * liability to discharge falls *primâ facie* in the *411 first instance on his personal estate, that is to say, it lies on those who assert his personal estate not to be the primary fund for

(a) 12 Sim. 206.

(b) 16 Jur. 281.

(c) 9 Bligh (N. S.), 157; 3 Cl. & Fin. 82.

(d) 9 Hare, 75.

(h) 3 Myl. & K. 358.

(e) 2 Sim. & St. 323.

(i) 2 De G., M. & G. 300.

(g) 12 Jur. 429.

discharging those incumbrances to maintain and prove that assertion, which, in my opinion, they have done. The intention and effect of the deeds executed by the testator and his son respectively that are before us, or of such of them as have any bearing on this part of the controversy, were, in my judgment, to make the mortgaged estates the first or only fund for their discharge, so far as the two earls could do so. The Vice-Chancellor appears to have thought it plain and evident, and it is I agree plain and evident, that certainly as between the two earls and as between Earl Edward and the male issue, if any, of Earl Alfred, this was so. And I think an intention that this should not be or should cease to be so if, at the death of Earl Alfred or afterwards, there should happen a failure of the male issue of that nobleman—I think, I say, such an intention—not only a very improbable intention to impute to the father or the son, but one opposed to their written language. How the case would have stood if the father had survived the son it is unnecessary to say: whether that event would have made any or no difference (and I do not mean to suggest that it would have made any), it did not happen, nor can we suppose that any man in the lifetime of Earl Edward could have known that Earl Alfred would not live for half a century after him, or would not leave male issue. I am of opinion, that for all the purposes of this suit the estates comprised in the mortgages that I have mentioned must be taken and treated as the first fund for discharging the principal sums secured by them, and that the general personal estate of Earl Edward must be, if it has not been, exonerated from the interest on those sums accrued since his death.

Next in point of convenient order may, perhaps, as
 *412 *well be taken the question whether, on the part of the late Lord Langdale and his widow, the plaintiff, or one of them, there has been such a breach or neglect of the injunctions of the “name and arms clause” contained among the testamentary dispositions of Edward Earl of Oxford (who died in the year 1848) as that under them the life-interest to which, by virtue of them, the plaintiff became, or would otherwise have become, entitled in the real and leasehold estates affected by that clause, or in part of them, has been forfeited by the plaintiff or shifted from her, a question the answer to which must be in favour of Lady Langdale (who upon the death of her brother Alfred Earl of Oxford took

the proper steps for assuming and duly assumed the name and arms of Harley), unless in order to preserve wholly that life-interest it was necessary for Lord and Lady Langdale or one of them to assume or endeavour to obtain a license and grant, or a license or grant, for assuming the name and arms, or name or arms, of Harley in the lifetime of Alfred Earl of Oxford, who survived his father Earl Edward four years and upwards, and survived Lord Langdale more than eighteen months, Lord Langdale having survived Earl Edward two years and upwards, — and I am of opinion, according to what I consider the true construction, whether of the will alone or of the will and codicil read together, that it was not. To impute to the testator an intention that during the life of his son or while there should be male issue of that son in the male line any daughter or the husband of any daughter of the testator should take the name and bear the arms of Harley is to ascribe to him, I do not say an impossible, but certainly a very improbable intention, an intention that ought not to be inferred from obscure or ambiguous expressions, or from language susceptible of a less eccentric interpretation. But it is an ascertained fact that the testator neither at the time when his will was made, nor

* at the time when the codicil was made, had any freehold, * 413 copyhold, or leasehold property except that to which, subject to the incumbrances affecting the family estates and subject to his own life-interest, and subject to the joint power of appointment vested in himself and Lord Harley, the latter was entitled for his life, with remainder to his first and other sons, if any, in tail male. Looking at the whole of the will, whether alone or together with the codicil, but attending to the circumstances that I have mentioned, though not forgetting the plausible observations fairly made at the bar on the mode or form (perhaps singular) in which the furniture at Eywood and the residuary personal estate are given, and on the language of the powers or some of the powers contained in the will as contrasted or compared with the language of the “name and arms clause,” with reference to possession and receipt of the rents of the property, I am of opinion, as I have said, that the testator did not mean to impose nor did impose on any person the obligation of taking the name of Harley during the life of Earl Alfred or bearing the arms of Harley in the lifetime of that nobleman, or seeking while he was alive to obtain any

license or grant for either purpose. There has consequently, in my judgment, been no forfeiture, no shifting.

Next, I may deal with the point raised as to the chattel leasehold property formerly of Miss Harley, to which her brother Edward Earl of Oxford, or the estate of that nobleman, as her next of kin, became entitled. It is contended that, as this property formed if not the whole at least a portion of her general residuary personal estate, and his title to it was only in that character, and merely equitable, as he survived her for the short period of less than two months only, as her will (for she died but partially intestate) was not proved in his lifetime, as part or perhaps

* 414 the whole of her * leasehold estate might have been sold by her personal representative for the payment of her debts and legacies, and as in fact its rents or some of its rents for a time after Earl Edward's death were so applied, his interest in her leasehold property ought to be treated as part of his residuary personal estate, the republication of his will in 1845 making, it is said, no difference in this respect. To that argument I cannot accede. The debts, legacies, and funeral and testamentary expenses of Miss Harley were, I assume, not as to any part of them paid in the lifetime of Earl Edward. I assume that the rents of her leasehold property were for some time after his death applied by her personal representative for that purpose. I assume that part at least of her leasehold property might have been sold or mortgaged for that purpose, but no such sale or mortgage has taken place, her funeral and testamentary expenses, debts, and legacies have been fully and duly discharged out of her personal estate (including the rents that I have mentioned) without resorting to any such step, and her leasehold property has accordingly been assigned to the personal representatives of Earl Edward in right of that nobleman as the testatrix's sole next of kin at her decease. The matter, therefore, for every purpose of the present cause, stands in my judgment on the same footing as it would have done if her leasehold property had been bequeathed to her personal representative specifically in trust (subject with the other personal estate to the payment of her funeral and testamentary expenses, debts, and legacies) for her brother. The codicil, it is true, was made in Miss Harley's lifetime, but was made after the year 1838, and republished the will, and neither instrument, considered as

speaking at the date of the codicil, or as speaking immediately before the testator's death, appears to me to exhibit an intention that leasehold property which had been or might be acquired by him after the * codicil should not be enjoyed under his testa- * 415 mentary dispositions in the same manner as the leasehold property which he had when he made his will.

Upon the case of *Cole v. Scott*,¹ cited at the bar, I give no opinion, except that whether it was rightly or otherwise decided, I conceive that it has no bearing on the controversy before us, and, I repeat, that in my judgment Lady Langdale is, under the testator's testamentary depositions, as much entitled for her life to the leasehold property which belonged to Miss Harley as to that which, having not belonged to Miss Harley, belonged to the testator at the time when he made his will.

It is, however, contended against Miss Bickersteth, a devisee named in the codicil, that, on the hypothesis of the codicil having republished the will and of the true construction of both instruments, so far as property is concerned, being such as it would have been if both had been made after Miss Harley's death, the codicil has no effect on any part of the testator's copyhold or chattel leasehold property adverse to the appellant Edward Bacon, the son of his daughter Lady Charlotte Bacon. This proposition is denied on the part of Lady Langdale and Miss Bickersteth, the latter claiming to be, by force of the codicil, interested in the whole of the copyholds and leaseholds, and insisting that the appellant Edward Bacon is excluded from them. But it is insisted, moreover, on the part of Lady Langdale or Miss Bickersteth or both of them, that Lady Langdale being alive, and the facts, in other respects, being as they are, the Court ought not now to make a declaration or express an opinion upon the question whether, as to copyhold or leasehold estate, Miss Bickersteth takes any interest under the codicil, and this last is the view which, as my learned brother informs me, he has of the matter, a view in accordance, so far as it extends, with the order under * appeal, and one, consequently, my * 416 agreement in which or disagreement from which is unimportant (for my learned brother and myself, if we differ in any respect, do not differ as to the costs of the appeals). In these circumstances, I do not think it incumbent on me to state, and I abstain from stat-

¹ 1 Mac. & G. 318 and notes. This case was disapproved in *Castle v. Fox*, L. R. 11 Eq. 542, 553, 554, by *MALINS V. C.*

ing, whether the same view is taken by me, and of course, therefore, I am silent also as to what would in my judgment be the proper declaration to be made, were a declaration now to be made, as to the effect or absence of effect of the codicil on the copyhold or leasehold property beyond what I have said.

We think that the costs of the appeals on each side should be costs in the cause. The defendants Messrs. Briggs, the executors of Edward Earl of Oxford, having, as well as all the other parties, agreed by their counsel (though of course without prejudice to any right of appeal to the House of Lords on the merits) that we should, under the appeals before us, exercise jurisdiction concerning the custody of such muniments of title relating to the leasehold property or to any portions of it as are in the possession of Messrs. Briggs, we have considered that matter also, and are of opinion that the plaintiff desiring to have is entitled to have the custody of them under such terms as shall be reasonably sufficient for the protection and security of Messrs. Briggs and the persons who, besides Lady Langdale, are or may be, under the testator's testamentary dispositions, beneficially interested in the property.¹

THE LORD JUSTICE TURNER. — Four questions are raised by these appeals : 1st. Whether the shifting clause contained in the will and referred to by the codicil of Edward Earl of Oxford has taken effect upon the life-interests given by the will to Lady * 417 Langdale, Lady Frances Harcourt, and Lady * Charlotte Bacon in the testator's freehold, copyhold, and leasehold estates, and has worked a cesser or determination of such life-interests in all or any part of those estates. 2dly. Whether the dispositions made by the testator's will of his copyhold and leasehold estates after the death of Lady Langdale are revoked or altered by the codicil. 3dly. Whether the leasehold estates of Miss Harley, which formed part of her undisposed-of residue, and to which the testator, as her sole next of kin, became entitled long after the date of his codicil, and very shortly before his death, passed under the specific bequest of his leasehold estates or under the residuary clause contained in his will ; and 4thly. Whether the residuary personal estate of the testator is the primary fund for the payment of certain mortgages for 20,000*l.* and 1650*l.* created by the testa-

¹ See *Lewin Trusts* (5th Eng. ed.), 482, 483.

tor, and in which he covenanted for the payment of those sums.

The first two of these questions arises thus: By a deed dated the 20th March, 1832, some freehold estates were settled, subject to prior trusts which are not material to be stated, upon trust for Edward Earl of Oxford for life, and after his decease for Alfred Lord Harley, his then only son, for life, and after his decease for the first and other sons of Alfred Lord Harley in tail male, and then for the first and other sons of Edward Earl of Oxford by any future wife in tail male; and, subject to these trusts, upon trust for Edward Earl of Oxford in fee, and some copyhold and leasehold estates were settled upon corresponding trusts. Edward Earl of Oxford was at the date of his will and of his codicil entitled to the reversion of these settled estates, but he had not at either of these times any other estate whatever, either freehold, copyhold, or leasehold.

By his will dated the 19th March, 1835, he gave and devised in these terms: [His Lordship read the will.]

* Now that will bore date the 19th March, 1835. The * 418 Wills Act having passed in the mean time, the testator made a codicil to his will, dated the 12th May, 1845, by which he recites the marriage of Lady Langdale, also the marriage of Lady Frances Harcourt, and the marriage of Lady Anne St. George, then he gives and devises all his freehold manors, messuages, lands, tenements, tithes, &c., in these words: [His Lordship read the material parts of the codicil.]

After the date of his codicil he purchased a small freehold estate called Weobley's Ash, and subsequently, very shortly before his death, he became entitled to some other freehold estates as the heir of his sister Frances Harley. These after-acquired estates, by the operation of the Wills Act, passed under the devise of freehold estates contained in his will. He died on the 28th of December, 1848, without having married again, leaving his son Alfred Lord Harley, who thereupon became Earl of Oxford, and his four daughters named in his will him surviving. Earl Alfred afterwards died on the 19th of January, 1853, without having had issue, and on the 14th March, 1853, Lady Langdale duly obtained her Majesty's license to take and use the name and bear the arms of Harley, which she has accordingly ever since taken and used.

Upon these two first questions, it was contended on the part of

the appellant Edward Bacon, who is the eldest son of Lady Charlotte Bacon and the first tenant in tail under the will, that upon the true construction of the shifting clause Lady Langdale was bound to take the name and arms of Harley within a year after the testator's death, and that in consequence of her not having done so, her life-interest in all the estates, or at all events in the

Weobley's Ash and the estates descended from Miss Har-
 * 419 ley, ceased and determined. That Lady * Frances Harcourt's and Lady Charlotte Bacon's life-interests in like manner ceased and determined in consequence of their not having taken the name and arms within a year after the determination of the estates preceding their life-interests respectively. That the codicil did not alter the disposition of the copyhold and leasehold estates made by the will, and that the appellant Edward Bacon has now, therefore, a present title to those estates, but that, even assuming him to have a reversionary interest merely and no present title, it is the duty of the Court now to declare his rights, and to give directions consequent upon the declaration of them.

The argument on the part of the appellant Edward Bacon in support of his claim to have his rights declared and directions given with respect to them, even assuming his interest to be reversionary merely, was so strongly pressed at the bar that I think it right, in the first place, to state my opinion upon that point, the more so as it is certainly a point of much importance with reference to the course and practice of the Court, and, I may perhaps add, to the law of the country. As long as I have known this Court, now for no inconsiderable period, I have always considered it to be settled that the Court does not declare future rights,¹ but leaves them to be determined when they may come into possession. In all cases within my experience where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. This practice has been so familiar to me, that I confess myself to have been surprised at the length to which the argument on the part of the appellant Edward Bacon was carried on the point, but having looked into the cases since the argument, I feel bound now to say that I have been not
 * 420 less surprised to find how little authority * is to be found

¹ *Ante*, 391, in note.

upon the subject. Authority, however, is not wholly wanting upon it. In *Eq. Cas. Abridged* (a) there is this case (*Hitchcock v. Sedgwick*): "If there are two persons, and each of them pretends to be the purchaser of a reversion after an estate for life, and one of them exhibits his bill to try his title and to perpetuate the testimony of his witnesses, such bill will be dismissed, not being proper in the lifetime of the tenant for life." Such a bill could not be improper as a bill to perpetuate testimony. It could be improper only as a bill to try the title, as in *Thelluson v. Woodford*, (b) where the court declined to decide the point as to the uncertainty of the ultimate disposition, and though Mr. Justice LAWRENCE puts the refusal upon the possibility that the state of the family might prevent the point from ever arising, which may not be the case under the will now before us, the Master of the Rolls seems to have rested the refusal upon the broader ground that the point was not ripe for decision.

In *Wright v. Atkyns*, (c) Atkyns, by his will, dated the 29th of October, 1804, devised and bequeathed all his manors, &c., as well leasehold as freehold and copyhold, or of whatsoever tenure in Kettering, and other specified places, and all other his real estate, unto his mother Charlotte Atkyns and her heirs for ever, in the fullest confidence that after her decease she would devise the property to his family, and he thereby subjected and charged the aforesaid hereditaments and premises with the payment of all his just debts that he should owe at the time of his decease. He appointed his mother sole executrix. A bill was filed by the heir-at-law in his character of heir, and also as mortgagee of the estates under some mortgages which were prior in date to the will, and which had * become vested in him, contending that the * 421 words "his family" meant the heir-at-law, and therefore, that there was a trust in Mrs. Atkyns, by which she was bound to devise the estate to the heir-at-law. The plaintiff was also a trustee for sale for payment of debts under a conveyance from the testator's father. And the bill prayed for an account of what was due for principal and interest upon the mortgages, and that the defendant might be decreed to pay the same in case the Court should be of opinion that she was entitled to the fee-simple and inheritance of the estates devised, or in default of payment or in

(a) Vol. I. p. 234.

(b) 4 Ves. 277.

(c) 17 Ves. 255.

case the Court should be of opinion that the defendant was entitled to an estate for life only, and therefore not bound to pay the plaintiff, then that the amount might be raised by sale.

The cause was heard before Sir WILLIAM GRANT, who by a decree dated the 13th July, 1809, (a) declared that Charlotte Atkyns was only tenant for life of the estates devised by the will of Wright Edward Atkyns, and that John Atkyns Wright was entitled to raise by sale of the estates what should be found due to him for principal and interest accrued at the time when Charlotte Atkyns took possession thereof, and that what should be found due for interest accrued since Charlotte Atkyns took possession ought to be answered by her personally. And it was ordered that what should be found due for principal and interest, to the time when Charlotte Atkyns took possession of the said estates, should be raised by sale accordingly. So that there Sir WILLIAM GRANT decided that Mrs. Atkyns, though the devise was to her and her heirs, was nevertheless only tenant for life according to the true construction of that will, and that the interest on the

* 422 mortgages ought to have * been kept down by her from the period when she came into possession under the will of the testator, but that the principal and interest due at the time of the death of the testator should be raised by sale or mortgage of the estate.

This decree was followed by an injunction granted by Lord ELDON on the 12th February, 1813, restraining Mrs. Atkyns from cutting timber, (b) and afterwards it was followed by an order of Lord ELDON on an appeal from the decree, and by which he affirmed it, dated the 7th February, 1815. (c)

Both those orders, the order for the injunction and Lord ELDON's order, affirming the decree, and the decree itself, were appealed to the House of Lords, and on the hearing of the appeal, in which I have seen the cases, I find that one of them raised the point whether it was right for the Court to decide that question. On the hearing of the appeal on the 26th March, 1823, both the order and the decree were reversed, and the following order was made by the House of Lords: "Ordered and adjudged, that the said order or decree of the Master of the Rolls of the 13th July, 1809, and the said order and decree of the Lord Chancellor of the 7th

(a) See 1 T. & R. 145.

(b) Coop. 111.

(c) 12 Ves. 299

February, 1815, affirming the same, so far as the first decree has declared that the appellant Charlotte Atkyns was only tenant for life of the hereditaments and premises therein mentioned, and all directions consequent thereupon, be reversed without prejudice to any question which may hereafter arise touching the construction of the testator's will; and it is further ordered and adjudged, that the said order or decree of the 12th February, 1813, whereby it was ordered that an injunction should be awarded against the said Charlotte Atkyns to restrain her, her agents, servants, * and workmen from felling or cutting down any timber or * 423 other trees, so far as the said order was founded on the declaration in the said order or decree of the 13th July, 1809, that the said Charlotte Atkyns was only tenant for life of the hereditaments and premises in the said decree mentioned, be reversed; and it is further ordered, that the said Charlotte Atkyns do apply to the Court of Chancery as she may be advised, touching such injunction as awarded or on any other ground." So that the House of Lords declared that the declaration which Sir WILLIAM GRANT had inserted in the decree that Mrs. Atkyns was tenant for life only, and the injunction granted by Lord ELDON consequent upon that declaration, were both erroneous and ought to be set aside and reversed, without prejudice to any question that might thereafter arise touching the construction of the testator's will.

In consequence of this order the injunction originally granted was dissolved, but a fresh bill was then filed by the devisees of the heir for an injunction to restrain the cutting of timber, and upon this bill and the motion for an injunction the following order (a) was made by Lord ELDON: "Let the defendants Charlotte Atkyns, Elizabeth Berney, and Thomas Trench Berney be at liberty to cut down the timber standing and growing upon the premises in question in this cause in a husbandlike manner as tenant in fee, giving the plaintiffs an account of what is felled. And let the said defendants Charlotte Atkyns, Elizabeth Berney, and Thomas Trench Berney pay the money to arise from the sale of the said timber, the amount to be verified by affidavit, into the bank with the privity of the accountant-general of this Court, to be there placed to the credit of this cause, and let them be at liberty to apply to this Court for more enlarged powers

(a) 1 T. & R. 164.

* 424 * of cutting the said timber. And let any agent to be appointed by the plaintiffs have liberty from time to time to attend and see that the cutting of the timber is proper, according to the meaning of this order. And let the plaintiffs be at liberty to apply to this Court as they may be advised. And let the said defendants be at liberty to apply to this Court to have the said money paid out to them upon giving security for the same, and let the said defendants be at liberty to appeal from this order to the House of Lords, notwithstanding they act under the same." The Court made no other order. Lord ELDON's view was, that if he granted the injunction to restrain Mrs. Atkyns from cutting timber, the opportunity of cutting it, supposing her entitled to it, might be wholly lost to her. He therefore gave them liberty to cut, paying the money into Court.

This order was also appealed to the House of Lords, and on the hearing of that appeal the following order was made on the 7th July, 1823: "It is declared that, according to the true construction of the testator's will, the intention of the testator must be taken to have been to give to the appellant Charlotte Atkyns a right to cut the timber in question for her own use and benefit, and that she ought not to have been restrained in the due execution of that right, and that, therefore, the Order of the 26th of April last ought to be reversed, and that the motion upon which such order was obtained ought to have been refused. And it is accordingly ordered and adjudged, that the said order of the 26th April last be reversed, without prejudice to any question which may arise touching any right in the said Charlotte Atkyns to make any disposition of the fee-simple of the freehold and the absolute interest in the copyhold and leasehold estates in question respectively, in consequence of any words contained in the said

* 425 will, importing any restraint * on her disposition thereof respectively, and without prejudice also to any question whether the respondents or any of them had any right to institute this suit."

These orders are of the highest authority, not only as having been pronounced by the House of Lords, but as having emanated from Lord REDESDALE, than whom no judge has ever existed more eminently distinguished for his knowledge of the powers and duties of Courts of Equity and of the course and practice of those Courts. It is to be observed how carefully they are framed, to

avoid deciding upon future rights. By the first of them, Sir WILLIAM GRANT's declaration of the tenancy for life, and all the directions consequent upon it, are reversed, without prejudice to any future question upon the construction of the will. By the second of them, the right to the timber is declared, but without prejudice to any question as to the right to dispose of the estate; and yet, in each of those suits, the question was between the devisee claiming to be entitled to dispose of the fee under the will, and the heir of the testator disputing that claim.

Again, in *Ferrand v. Wilson*, (a) I find Sir JAMES WIGRAM expressing himself thus: "Upon the question concerning the exchange I have never felt any serious doubt, since my attention was called to the fact that the estates under this will are legal estates. The plaintiff's equity of relief, in respect of this exchange, will be found to resolve itself into that which, for the argument, I will admit to be a defect in the jurisprudence of this country, namely, the want of a jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. I mean not to express any opinion, one way or the other, as to what the plaintiff's rights might have been if an estate at law had passed by the conveyances, * or if waste or destruction * 426 of the property taken, or attempted to be taken, out of the settlement were elements in the present case. In such cases the plaintiff might allege present disturbance of right, or present injury to his inheritance. But what injury, legal or equitable, has the plaintiff necessarily sustained in this case? The estates being legal, and the powers of exchange limited to exchange for land of at least equal value, if that value was not obtained in the exchange the exchange is void, and no estate passed by the conveyance by which the attempt was made to effectuate it. In law and in equity the conveyances are innocent, unless the exchange be valid. If the plaintiff has sustained no present injury, what ground has he for asking the assistance of this Court in a case in which, *ex concessis*, the legal and equitable validity of the execution of the power to exchange depend upon the same question, that is, the comparative value of the lands given and taken in exchange?" So that there the learned judge says, he admits the defect in the jurisprudence of the country, the want of the jurisdiction to ascer-

(a) 4 Hare, 385.

tain and declare rights before the party interested has sustained actual damage. And in *Grove v. Bastard*, (a) Lord COTTENHAM says, "The Courts in this country have not the power which the Courts in Scotland have of settling such questions by declarator."

There are also the cases of *Greenwood v. Sutherland*, (b) and *Garlick v. Lawson* (c) before the Vice-Chancellor Wood, in which he refused upon special cases to make declarations affecting future rights; and I may also mention, although certainly not by way of authority, a case which was before me as Vice-Chancellor, in

which, upon a bill to execute the trusts of a settlement filed * 427 * either by the trustees of the settlement or by a tenant for life under it, a question was attempted to be raised upon the illegitimacy of an alleged child of the marriage, who, if legitimate, would have been entitled in remainder under the trusts, and I thought that the question could not be raised upon such a bill during the lives of the tenants for life.

It is not, however, upon modern authorities only that this question, as it seems to me, must depend. I think the question deeply affects the law of the Court. This Court entertains bills to perpetuate testimony, upon the ground that the future right cannot be determined. If the Court has authority to declare future rights, upon what ground, in the case of equitable estates, are such bills hereafter to be maintained? The great convenience and advantage which it would be to parties to have their future rights ascertained and declared was much pressed upon us in the course of the appellant's argument, but the course and practice of the Court constitutes the law of the Court, and I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the legislature to alter it; and I am far from thinking that, to some extent at least, the legislature might not usefully interpose, and provide some remedy for the ascertainment of future rights; but I think if this be done at all it should be done by the legislature, as the legislature alone can fence the measure with the protections which will obviously be required; and such a measure, if adopted, ought not to be confined to mere equitable rights.

This subject was much pressed upon my attention when the Special Case Act was framed. Lord COTTENHAM was desirous that

(a) 2 Phil. 621. (b) 10 Hare, App. 12. (c) 10 Hare, App. 14.

the Act should be extended, so as fully to introduce into our law the Scotch declarator, but it was ultimately thought more prudent in the first * instance both by him and by me to * 428 limit the remedy, leaving the further extension of it to future legislation. Whether the Act could now be usefully extended is for others, not for me, to consider. It certainly was not intended to embrace, and I think it has been rightly construed by the Vice-Chancellor WOOD not to have embraced, the declaration of future rights.

Some aid to the appellant's argument on this part of the case was also attempted to be drawn from the 50th section of 15 & 16 Vict. c. 86, the Improvement of Jurisdiction Act, but I take the same view of that enactment as the Vice-Chancellor WOOD seems to have taken of it in *Garlick v. Lawson*, that it does not extend the cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them.

Generally speaking, therefore, I apprehend that it is not according to the course of the Court to declare future rights.¹ But then it was argued on the part of the appellant, Edward Bacon, that whatever might be the general course of the Court, there were circumstances in this case which rendered it proper to make the declaration, even assuming the appellant's interests to be reversionary merely. The intermixture of the freehold and copyhold estates, the existence of mortgages overriding both such estates, and the necessity therefore of ultimately distinguishing the freehold and the copyhold, and apportioning the mortgages upon them, were relied upon in support of this view, but if any weight would be due to these circumstances in ordinary cases, as to which the case of *Wright v. Atkyns* is not unimportant to be attended to, the facts of this case appear to me to remove that weight. By the decree in the cause, directions * were given for dis- * 429 tinguishing the freehold, copyhold, and leasehold estates, and by the certificate it has been found that the freehold and the copyhold cannot be distinguished, and to this certificate there has been no objection. It would be in vain therefore to give any further directions for inquiry upon this subject, but the quantities of the

¹ See *ante*, 391, and cases cited to this point.

copyhold are ascertained by the certificate, and the appellant therefore, if he should ultimately succeed, will have a right to have those quantities set out for him, and as to the apportionment of the mortgages, they must either be raised by sale or continue as charges. If they are to be raised by sale, the same difficulty of distinguishing the estate presents itself. If they are to continue as charges, the appellant has no further interest than that the interest should be kept down, and if it be not kept down, he can apply to the Court for a receiver.

Assuming then the interest of the appellant Edward Bacon to be reversionary, I see no ground for disturbing this decree, so far as his interest is concerned. But then it is said that by the operation of the shifting clause determining the interests of Lady Langdale, Lady Frances Harcourt, and Lady Charlotte Bacon, the appellant's interest under the will in the copyhold and leasehold estates has come into possession, the disposition of those estates made by the will not being, as the appellant insists, altered by the codicil. It becomes necessary, therefore, to consider the effect of that clause.

The authorities, I think, warrant us in saying that these shifting clauses, if not to be construed strictly, are, at all events, not to receive such a construction as shall carry them beyond the purpose for which they were designed. The intention of the testator, to be ascertained from the language which he has used, and from the surrounding circumstances, so far as those circumstances

* 430 can be regarded * in proof of the intention, must govern the construction of shifting clauses as well as of other clauses of wills, but regard is also to be had to the rule that an estate, well created, is not to be taken away by doubtful or equivocal expressions. Now, the language of this clause is this: [His Lordship read it.] The obligation imposed, therefore, upon the persons who may take under the limitations, or by virtue of the proviso, is that of taking the name and arms within one year after they shall become entitled to the possession or receipt of the rents and profits of the estates devised, or to speak more strictly, of the freehold estates, for the words are, "of the manors, &c., hereinbefore devised." But, without regard to so strict a construction of the words, surely a person who is entitled only in remainder, after the determination of a previous life-interest and a possible estate tail, cannot be said to be entitled to the possession or to the receipt of

the rents and profits of the estates. How can there be any right to the possession or receipt of the rents when there is another person in such possession or receipt under a lawful title? There is, indeed, a present title to the estate in remainder, and a title in remainder to the possession and receipt of the rents, but the will does not in terms speak of estates in remainder, or titles in remainder. And it was plainly not the intention of the testator that the proviso should be construed to apply to such estates or titles. For, as was well observed in the argument, if this was the testator's intention, every person who at the death of the testator took any estate under the limitations of the will must have been bound to take the name and arms within a year after the testator's death, a construction which, although reconcilable, is not very consistent with the language of the proviso imposing the obligation upon those who are to take by virtue of it. Upon the language of this proviso, therefore, I am satisfied that what the testator intended was, * that it should operate upon his successive * 481 devisees as they should successively come into possession of the devised estates, and that this is the fair and reasonable construction of the clause.

But if the words of the clause were open to doubt, surely the surrounding circumstances would be sufficient to remove the doubt. The testator when he made this will had no freehold, copyhold, or leasehold estates in possession, he was disposing of reversionary estates, he must have known the state of his property, and it is not, I think, reasonable to impute to him that when referring to possession and receipt of the rents he did not use those words in their ordinary sense and intend them to apply to the estates when they should come into possession.

The testator, however, afterwards purchased and acquired by descent other estates, which by the operation of the Wills Act became subject to the limitations of the will. And it was argued on the part of the appellant E. Bacon, that in consequence of these estates being thus included within the devises of the will the shifting clause was brought into operation as to all the estates, or at all events would operate as to these particular estates. But I think this argument wholly untenable, it was rested, as it could only rest, upon the 24th section of the Wills Act, by which it is enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if

it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." And the effect of the argument would be this, that whereas the testator when he made his will and when he republished it by the codicil,

and thus brought it within the operation of the Act, intended that his estates should * not go over unless the name and arms should not be taken within a year after the devisees came into possession, he must now be taken to have intended that they should go over unless the name and arms be taken within a year after his death. But I do not so read this section of the Act. I think it was intended only to subject after-purchased and after-acquired estates to the dispositions previously made, and it would be a most unwarrantable and unsound construction of the Act to give it the effect of altering those dispositions. The operation of the section seems to me to be, to bring these after-purchased and acquired estates within the operation of the proviso according to the construction to be put upon it independently of the Act. And I think, therefore, that these particular estates could only go over with the originally devised estates. The intention was, that all the estates should go together, and there is no proviso to carry these estates over separately from the others.

Reliance was also placed on the part of the appellant, Edward Bacon, in the argument upon the shifting clause, upon the context of the will and especially upon the words "actual possession" occurring in the power of leasing and of sale and exchange and in the dispositions of the furniture and of the residue, and upon the nature of those two latter dispositions, but I do not see how the use of the words "actual possession" in the other parts of the will can alter the effect of the word "possession" in the shifting clause, nor can I venture, from the fact of the testator having by his will given the furniture to the daughter who should first become entitled to the actual possession and excluded her from any share of the residue, to draw the inference that he intended the estate to go over upon any of his daughters not taking the name and arms before she should come into possession.

* 483 * I am of opinion, therefore, that the shifting clause has not taken effect, and that the course and practice of the Court renders it improper for us during Lady Langdale's life to decide the question as to the dispositions of the copyhold and lease-

hold estates contained in the will being or not being altered by the codicil.

The next question is, whether Miss Harley's leaseholds passed under the bequest of the testator's leasehold estates or under the residuary clause contained in his will. This question arises thus: Miss Harley, by her will, gave the residue of her personal estate to Sarah Penny with certain words annexed to the bequest, which were afterwards held in this Court to amount to a trust. She died in November, 1848, very shortly before the death of the testator, possessed of very large personal estate consisting in part of leasehold property, and she left the testator her brother and sole next of kin. After the testator's death a suit was instituted in this Court by his executors against Sarah Penny, insisting that she was a trustee of Miss Harley's residue for the testator as her next of kin. By the decree of my learned brother in this suit bearing date the 6th of August, 1849, it was declared that Frances Harley, the testatrix in the pleadings named, bequeathed the residue of her personal estate to the defendant as a trustee for some purpose or purposes which the will and codicils of the said testatrix did not disclose, and the nature of which did not then appear; and it was referred to the Master to inquire whether the views and wishes concerning the disposition of such residue which were mentioned in the will of the said testatrix were ever and when declared or made known by her in or by any instrument, paper, or writing.

The decree of my learned brother was afterwards affirmed by the Lord Chancellor on the 7th of November, * 1851, but * 434 an appeal to the House of Lords was threatened, and in this state of circumstances a compromise was come to, by which it was agreed, among other things, that the leasehold estates should be assigned to the executors of the testator. This agreement was subsequently carried out, and a general report having been made in the suit, the cause was heard on further directions, and an order was made, bearing date the 23d of July, 1852, directing that the defendant Edward Penny should convey and assign to the plaintiffs, as the executors of the late Earl of Oxford, the several leasehold estates comprised in the first schedule to the Master's report. In pursuance of this order the leasehold estates in question were assigned to the testator's executors, and it is now to be determined whether they passed under the bequest of leaseholds or under the residuary clause contained in the testator's will.

The parties interested in this question are of course agreed upon the point, that there was an intestacy of Miss Harley as to the beneficial interest in the residue of her estate, and upon the facts before us there can be no doubt upon that point. The question which we are called upon to decide depends upon the effect of that intestacy. It was first argued, on the part of Lady Frances Harcourt, by whose appeal this question is raised, that these leaseholds, *qua* leaseholds, never became the property of the testator. But Miss Harley was not the less partially intestate from the moment of her death, because the question of her being wholly testate or partially intestate remained so long undecided, and the consequence of her having died partially intestate was, that the whole of her personal estate belonged to the testator, subject only to the payment of her funeral and testamentary expenses, debts, and legacies.

It was then, however, insisted that the whole or some
 * 435 * part of the funeral and testamentary expenses, debts, and legacies, and also the sum paid for the compromise, ought to be made good out of these leasehold estates. But as to the funeral and testamentary expenses, debts, and legacies, there were other assets of Miss Harley out of which they could be, and were ultimately, paid. And surely if these leaseholds were well bequeathed by the will of the testator, it was the duty of his executors to take care that they were not unnecessarily sold for the purpose of answering these payments. How could the residuary legatees of the testator be entitled to insist against the particular legatees that the leaseholds should be resorted to for such a purpose? And as to the sum given for the compromise, all the parties here are claiming under or taking the benefit of that compromise, and the terms of it were that the stock should be applied for that purpose, and the leaseholds assigned to the executors.

The true questions on this part of the case seem to me to be: Was the bequest of the leasehold estates contained in the will of the testator specific or general? and, if it was specific, are the leasehold estates in question to be held to have been included within it by the operation of the 24th section of the new Statute of Wills? Upon the first of these questions, on looking into the authorities, I certainly am not satisfied that this bequest is not specific, though there may be grounds for distinguishing this case. But I think it unnecessary to give any opinion upon that point; for, assuming the bequest to be specific, I am of opinion that the

leaseholds in question must be held to be included within it by virtue of the above enactment.

The first question is what is the meaning of the words in the section of that Act, "with reference to the real * estate * 436 and personal estate comprised in it." The strict and literal meaning of these words standing by themselves would, perhaps, be "with reference to the real estate and personal estate then actually comprised in the will;" but it is plain that this was not the intention of the legislature; for the context shows the enactment had reference to property not then actually comprised in the will. This meaning then being excluded, is there no other meaning which can be attached to the words without doing violence to them? I think that there is, and that the true meaning of the words, so far as the will comprises dispositions of real and personal estate, — a meaning which it is to be observed falls in with the context, — is, that, to this extent, the will is to speak and take effect as if executed immediately before the death.

Adopting, then, this construction of the section, let us apply it to the case before us. The will, it is to be remarked, is not only to speak, but to take effect, as if executed immediately before the death. How is this will to take effect as if executed immediately before the death if these leaseholds, which, had it been so executed, must have passed under the bequest which I have assumed to be specific, are to fall into the general residue? It was suggested in the argument on the part of Lady Frances Harcourt, that the words of this section, so far as the personal estate is concerned, ought to be construed to have had reference to adeemed legacies, and the case of *Coppin v. Ferryhough* was referred to as an instance in which the enactment might well have been intended so to operate. But if it was the intention of the legislature by this section to alter the law as to adeemed bequests, upon what grounds are we to hold that it was not intended to make the more extended alteration, which the construction I have put upon the enactment imports? The Act was clearly intended to make devises of land, * which before it passed were in their nature specific, more * 437 extended in their operation. Why are we to impute to the legislature that it had not the same intention as to specific bequests when expressed, like the bequest in this will, in general terms? For, of course, there must be a distinction in each case depending on the terms of the bequest. To adopt the construction

of this section of the Act, contended for on the part of Lady Frances Harcourt, would, I think, be to put a narrow construction upon words which were clearly intended to have a wide operation. I think, therefore, that unless a contrary intention can be held to appear by this will, these leaseholds must be held to have passed under the bequest of leasehold estates.

It was argued, however, that a contrary intention does appear by this will, and the argument was put thus, that the words "my leasehold messuages, &c.," were equivalent to the words "the leasehold messuages, &c., I now possess," for which *Cochran v. Cochran* was cited. And then *Cole v. Scott*¹ was referred to to show that the word "now" was sufficient to indicate a contrary intention within the meaning of the Act. But I think that this argument was more subtle than sound. Upon the question of indicating a contrary intention, there is, as it seems to me, a substantial difference between gifts expressed in these terms, "I give all my leasehold estates," and "I give all the leasehold estates I now possess." The latter form of gift seems to me to indicate much more distinctly than the former that the testator intended to give only what he had at the time.²

Upon the whole it does not appear to me that this will can be said to show an intention that after-acquired leaseholds should not pass under the disposition of the testator's leasehold * 488 estates, and I am of opinion, therefore, * that the leaseholds in question are included within that disposition.

The fourth and only remaining question is, whether the residuary personal estate is the primary fund for the payment of the mortgages for the 20,000*l.* and 1650*l.* The question arises thus: those mortgages were created, I think, in the years 1802 and 1803 by deeds, by which the testator covenanted for the payment of the mortgages. Afterwards, in the year 1832, the family estates were resettled under a joint power given to Earl Edward and Earl Alfred, and at the same time the mortgaged estates are expressly

¹ 1 Mac. & G. 518, and notes.

² "Should a man bequeath all his estate in the public funds, all his bank and insurance stock, or all his farming stock and utensils, it would embrace all held at the time of his decease, whether held at the date of the will or acquired afterwards. But if it were all shares *which I now own* in such a bank, or all cattle and horses *now* on my farm, it would describe specific shares and particular cattle and horses, and could not extend to others." SHAW C. J., in *Wait v. Belding*, 24 Pick. 136. See *Foote, Appellant &c.*, 22 Pick. 299.

settled subject, amongst other mortgages, to these mortgages. Under these circumstances I am of opinion that the personal estate is not the primary fund for payment of these mortgages. It is true that these mortgage debts were originally the debts of the testator, and payable out of his personal estate, but it was open to him to declare, that as between the mortgaged estates and his personal estate, the former and not the latter should bear the burden of these debts, and when the resettlement was made these estates were settled expressly subject to the mortgages. The testator put into settlement the estates less the amount of the mortgages, the devisee taking the reversion in fee, which was limited to him by the settlement; and to hold the personal estate to be the primary fund is in truth to hold that as against the testator's personal estate he settled the estates free from the mortgages, although as against the other parties interested under the settlement they were settled subject to the mortgages. I cannot reconcile my mind to this conclusion. I think the clear intention was, that the mortgaged estates should bear the burden of these debts, and if authority were wanting upon the point, I think the case of *Ibbetson v. Ibbetson* is decisive upon it. * I am of opinion, * 439 therefore, that the decree in this respect must be varied.

Upon the question as to the delivery of the deeds I have nothing to add to what my learned brother has said.

In the Matter of JOHN QUYE VIALL, a person of Unsound Mind.

HAWKINS v. PERRY.

Ex parte SARGEANT.

1856. June 27. Before the LORDS JUSTICES.

The plaintiffs in a suit for the administration of a mortgagor's estate, and the purchasers under a decree in the suit, presented a petition under the Trustee Act seeking an order to vest in the purchasers the legal estate in the purchased property, which was vested in a lunatic mortgagee not found so by

inquisition: *Held*, that a portion of the costs ought to be paid out of the mortgage money.¹

THIS was a petition of a purchaser under a decree in the above suit, and of the plaintiffs in the suit, seeking an order vesting in the purchaser the purchased property, the legal estate in which was vested in John Quye Viall, a person of unsound mind, not found so by inquisition. The mortgage money was unpaid, and the question was, whether the costs of the petition ought to be deducted out of it, or to be costs in the cause.

Mr. Wigram and *Mr. Hemming*, for the petitioner, contended that according to *Re Richards*, (a) *Re Wheeler*, (b) and *Re Biddle*, (c) following the former cases, the costs must come out of the mortgage money.

Mr. Elderton, for the defendants in the suit.

Mr. Southgate, for the mortgagee. — In *Re Wheeler* the lunacy was found by inquisition.

[THE LORD JUSTICE KNIGHT BRUCE. — What difference could that make?]

* 440 Moreover the sale here took place in * an administration suit for the benefit of all parties interested, and the costs of realizing the property ought to come out of the testator's estate. He referred to *Re Marrow*, (d) *King v. Smith*. (e)

Mr. Wigram, in reply, said that in *Re Biddle* there had been no inquisition.

Their Lordships directed that 10*l.* should be deducted from the mortgage money and be paid to the petitioners, and that the rest of the costs should be costs in the cause.

(a) 1 Jac. & W. 264.

(d)' 3 Myl. & Cr. 142.

(b) 1 De G., M. & G. 434.

(e) 6 Hare, 473.

(c) 23 L. J. Ch. 23.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1389; *Re Wheeler*, 1 De G., M. & G. 434, and cases in n. (2).

LAKE v. BRUTTON.

1856. June 24. July 9. Before the LORDS JUSTICES.

Where a mortgage was taken in part in respect of a sum for which the mortgagee represented himself to the mortgagor as being liable as a surety for the latter, and such representation was erroneous, to the knowledge of the mortgagee: *Held*, that to that extent the security could not be supported.¹

A debtor deposited a policy with his creditor as a security. Afterwards the debtor, with a surety who did not know of the deposit, covenanted with the creditor for payment of the debt, and contemporaneously the debtor executed a deed of counter security to the surety, neither deed referring to the deposit of the policy. Subsequently the debtor assigned the policy to the creditor as a security: *Held*, that the surety, on paying the debt, was entitled to the policy.²

THIS was an appeal from the decision of the Master of the Rolls, holding that a deed purporting to be made by way of security, was in part void, on the ground of misrepresentation and mistake, and on the appeal another question was decided as to the rights of a surety, for the payment of debts, with respect to securities held by the creditor.

By an indenture dated the 24th of July, 1847, and made between the Earl of Devon of the first part, Lord * Courte- * 441
nay of the second part, and the defendant Charles Brutton of third part, after reciting that a sum was due from the Earl of Devon and Lord Courtenay to the defendant Charles Brutton, and that Charles Brutton was then liable as surety on behalf of the Earl of Devon, and Lord Courtenay, or one of them, to Robert Brutton and John Tilley, or one of them, in the sum of 3000*l.*, upon which interest was then due, and that Charles Brutton might advance further moneys for the benefit of the earl and Lord Cour-

¹ See 1 Sugden V. & P. (8th Am. ed.) 4, 5; Burrowes v. Lock, 10 Ves. (Sumner's ed.) 470, n. (d) and cases cited.

² See 1 Story Eq. Jur. § 638; Aldrich v. Cooper, 8 Ves. (Sumner's ed.) 388, 389, and cases in n. (a); Cheeseborough v. Millard, 1 John. Ch. 413; Stevens v. Cooper, 1 John. Ch. 430, 431; Hayes v. Ward, 4 John. Ch. 180, 181; 1 Lead. Cas. in Eq. (3d Am. ed.) [86], [87], 137, 138, 144, 145; 3 *ib.* [832], [833], 543; Lidderdale v. Robinson, 2 Brock. 160, 167; S. C., 12 Wheat. 596; Atwood v. Vincent, 17 Conn. 583; Chitty Contr. (10th Am. ed.) 584, 585; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Lichtenthaler v. Thompson, 13 Serg. & R. 157; Wheatley v. Bastow, 7 De G., M. & G. (Am. ed.) 279, note (1).

tenay; and after reciting that the indenture now in statement was executed as well for the purpose of giving further security to Charles Brutton for the 10,000*l.* as also to secure to him, his executors, administrators, and assigns, all such further sums of money as he might either pay in discharge of his liability on account of the said sum of 3000*l.* so due to Robert Brutton and John Tilley, for the Earl of Devon and Lord Courtenay, or one of them, or for which Charles Brutton might thereafter become liable on account of either of them, not exceeding in the whole the sum of 5000*l.*, with interest at 4*l.* per cent; and after reciting that the Earl of Devon and Lord Courtenay had agreed to execute the indenture now in statement upon Lord Courtenay being indemnified by the Earl of Devon in manner expressed in a deed of even date then prepared and intended to be executed immediately after the execution of the indenture now in statement, it was witnessed, that Lord Courtenay thereby demised to Charles Brutton, his executors, administrators, and assigns, the hereditaments therein mentioned for a term of ninety-nine years, if he Lord Courtenay should so long live, subject to the proviso of redemption thereafter contained. The deed further witnessed, that Lord Courtenay thereby assigned to Charles Brutton, his executors, administrators, and assigns, a policy of assurance in the amicable

* 442 society for 5000*l.* subject to the proviso* for redemption thereafter contained. By this proviso the term was to be determined and the assignment to be void on payment to Charles Brutton of the 10,000*l.* and the other moneys above mentioned. The deed contained a covenant on the part of the Earl of Devon and Lord Courtenay to pay the 10,000*l.* and interest to Charles Brutton on the 24th of January, 1848, and also within six months after the other sums secured by the deed should amount to the principal sum of 5000*l.* to pay to Charles Brutton, his executors, administrators, and assigns, such further sum of money as he might at any time thereafter have paid to Robert Brutton and John Tilley, or either of them, in respect of the 3000*l.* for which Charles Brutton was surety as aforesaid, or which he should advance or become liable for in the manner therein mentioned, together with his costs.

By the deed of even date with the last-mentioned indenture, and referred to in it, Lord Devon assigned to Lord Courtenay (who had joined in the contemporaneous deed as a surety for Lord

Devon) certain policies of assurance and other property for the purpose of indemnifying Lord Courtenay against his liability under the contemporaneous deed.

Sometime previously in the year 1847, the earl had deposited a policy for 3000*l.* on his own life with Charles Brutton, as a security for advances which the latter had made to the earl, or for which he had become liable on the earl's account, being advances also secured by the first of the above-mentioned deeds of the 24th of July, which did not, however, notice the deposit of the policy.

In April, 1848, the Earl of Devon executed an indenture assigning other policies of assurance upon trusts * for * 443 indemnifying Lord Courtenay; and by an indenture of the 28th of December, 1848, the earl assigned to Charles Brutton the policy for 3000*l.* which had been previously deposited with him as a security, the assignment being in the indenture expressed to be made as a collateral security with the former of the above-mentioned deeds of July, 1847.

In March, 1850, Charles Brutton deposited this policy with his brother, the above-mentioned Robert Brutton, as a security.

By a deed dated the 1st of July, 1849, Lord Courtenay conveyed and assigned to the plaintiff all Lord Courtenay's interest under the indemnity deeds, in trust for the benefit of the creditors of Lord Devon and Lord Courtenay, parties thereto, and the creditors thereby covenanted to discharge all the personal liabilities of Lord Devon and Lord Courtenay, and to look to the property thereby assigned for the discharge of their debts.

The bill was filed by the plaintiff on behalf of himself and the other creditors of Lord Devon and Lord Courtenay, who had executed the deed of July, 1849, against Charles Brutton, Lord Devon, Lord Courtenay, and Robert Brutton, alleging that the recital in the deed of July, 1847, relative to the liability of Charles Brutton to pay the 3000*l.* therein mentioned to be due to Robert Brutton and John Tilley, or one of them, was false, and praying a declaration to that effect, and that an account might be taken of what was due to Charles Brutton by virtue of his mortgage, but that in taking the said account he might not be allowed to charge against the plaintiff or Lord Courtenay, any money in respect of that sum of 3000*l.* and interest, and also that the defendants might re-assign and deliver up to the plaintiff the policy * of * 444 assurance for 3000*l.* which had been deposited with Charles

Brutton in 1847, and assigned to him in 1848, and subsequently deposited with his brother.

There was in evidence a letter dated the 19th of September, 1849, written by Charles Brutton to his brother, in which he stated that at the time when the security of July, 1847, was given, he had felt (though not compellable or legally bound to pay his brother's and Tilley's debt), that he ought not to seek protection for himself only, but also for his brother, and that he had done so without any previous communication of his intention to his brother.

The Earl of Devon in his evidence stated as follows : "The said advances of 1500*l.* and 1700*l.* were distinctly spoken of at one or more of the said interviews, and were treated as part of the debt to Charles Brutton which was to be secured by their intended mortgage, and I can state positively and unequivocally, that it was my full understanding and intention that they should be covered by such security, and be placed on the same footing as any other advances made or procured by the said Charles Brutton, as having been obtained through his instrumentality, and he being, therefore, morally, if not legally, bound to repay them. I consider, too, that at those interviews such was equally the meaning and intention of my son Lord Courtenay, though how far it was expressed by him at the said interviews, I cannot recall to my recollection." "I can positively state that it was my own intention and meaning, and I am persuaded it was that of my said son at the time of the execution of the said mortgage-deed, that it should extend to and cover not only the loans advanced by the said Charles Brutton himself, but all those which had been advanced at his

* 445 instance or through his instrumentality, by his *relations, friends, and connections, including amongst the latter the 1500*l.* and 1700*l.* Had I been called upon to express my meaning and intention on that point, I should have stated it to the above effect, and so I fully believe would my said son." "I was not cognizant of the deposit of the policy for 3000*l.* with Robert Brutton, but so soon as it came to my knowledge I acquiesced in and sanctioned it."

The Master of the Rolls decided that the recital contained in the former part of the above deed of July, 1847, as to Charles Brutton being liable as a surety on behalf of Earl Devon and Lord Courtenay, was inaccurate, and that Lord Courtenay did not

know of this inaccuracy, but that Charles Brutton did, and could not, consequently, claim any advantage from the provisions of the deed, so far as they related to and were founded upon the inaccurate recital introduced at his instance, and that he could not consequently transfer any such advantage to another; and his Honor directed the usual accounts to be taken on the footing of the deed of the 24th of July, 1847, but that in taking such accounts no sums were to be allowed to the defendant Charles Brutton beyond the amount due for principal and interest on the 10,000*l.*, except such sums of money as had actually been paid by him, or which he should then be legally liable to pay. The case is reported in the 18th volume of Mr. Beavan's Reports. (a)

From this decision Charles Brutton appealed.

Mr. Roundell Palmer and *Mr. Erskine*, for the plaintiff, the respondent. — It was Charles Brutton's duty to represent the facts * quite accurately: *Owen v. Homan*; (b) espe- * 446
cially as he was the family solicitor. But the recital in the deed was to the knowledge of Charles Brutton contrary to the fact, and the portion of the deed which proceeds on the untrue representation and recital is inoperative. Lord Devon's evidence does not bind Lord Courtenay.

Next, as to the policy for 3000*l.*, the plaintiff's case is founded on the common equity of a surety to have delivered up to him on discharging the debt of the principal all the securities which the creditor holds for the debt, whether the surety was aware of them or not. The policy was deposited, in 1847, as a security for all sums which Charles Brutton might advance, and when Lord Courtenay paid them he was entitled to the policy. The assignment to Robert Brutton can make no difference, as he had notice of the equity of Lord Courtenay.

They referred to *Reynell v. Sprye*, (c) *Frazer v. Jones*, (d) *Mayhew v. Crickett*. (e)

Mr. Roupell and *Mr. Metcalfe*, for the defendants Charles Brutton and Robert Brutton. — There was no fraud on the part of

(a) Page 134.

(d) 5 Hare, 475.

(b) 3 Mac. & G. 378.

(e) 2 Swanst. 185.

(c) 1 De G., M. & G. 656.

Charles Brutton or Robert Brutton; and therefore, although the recital in the deed may not be strictly or legally accurate (there having been merely moral liability on the part of Charles Brutton), all parties understood what the transaction really was, and there is no ground for setting it aside. To accede to the plaintiff's demand would be, in fact, to assist him in avoiding Lord Courtenay's own contract.

* 447 * As to the policy for 3000*l.*, the policy was deposited before July, 1847. In July, 1847, when an express and specific indemnity was taken by Lord Courtenay, not noticing the policy, any implied contract arising from the relation of principal and surety must have ceased. The assignment of 1848 was a new transaction, and could not give to the surety any right to a security taken after the contract of suretyship was entered into. Charles Brutton might, therefore, have given up the policy at any subsequent time without consulting the surety. *Copis v. Middleton*, (a) *Newton v. Chorlton*, (b) *Wade v. Coope*. (c) Whatever might have been the rights of the plaintiff, if the policy had not been deposited as a security, it has been so with Robert Brutton without notice, and he is not affected by the pretended equity, if it could otherwise exist.

Mr. Forster, for Lord Devon.

Mr. Erskine, in reply, referred to *Hodgson v. Shaw*. (d)

THE LORD JUSTICE KNIGHT BRUCE. — The first question upon this appeal is the question which alone, as I understand the matter, his Honor the Master of the Rolls decided in the able and considered judgment delivered by him — a judgment that we have had the advantage of reading — namely, the question whether the security of the 24th of July, 1847, ought to be held to extend to the sum of 3000*l.* or 3200*l.*, called 3000*l.* in the deed, for which Mr. Charles Brutton (the solicitor of Lord Devon), who prepared it, is said to have been surety.

* 448 * The recital relating to that is thus in the first instance :

(a) T. & R. 231.

(b) 10 Hare, 646. See *Pledge v. Buss*, Johns. 663; *Pearl v. Deacon*, 1 De G. & J. 461.

(c) 2 Sim. 155.

(d) 3 Myl. & K. 183.

[348]

“And the said Charles Brutton is now liable, as the surety for or on behalf of the said William Earl of Devon and William Reginald Lord Courtenay, or one of them, to Robert Brutton and John Tilley, or one of them, in the sum of 3000*l.*, upon which some interest is now due.” And in a later recital, where the indemnity is mentioned between Lord Devon and his son, it is stated that they “have respectively agreed to make and execute these presents upon the said William Earl of Devon giving to the said William Reginald Lord Courtenay an indemnity in respect of any claims in respect of said money intended to be hereby secured, and which indemnity hath been or is intended to be forthwith given as the said William Reginald Lord Courtenay doth hereby admit and acknowledge.” And as to the sums secured there are these words: “Pay or cause to be paid unto the said Charles Brutton, his executors, administrators, and assigns, all such further sums or sum of money which the said Charles Brutton, his executors or administrators, shall or may at any time or times hereafter pay to the said Robert Brutton and John Tilley, or either of them, in respect of the said sum of 3000*l.* and interest, for which the said Charles Brutton is surety as aforesaid, and which he or they shall or may in manner aforesaid lend or advance.”

Now, in point of fact, it is clear, upon the evidence, that at this period Mr. Charles Brutton was not liable as a surety for that debt or any portion of it. Neither Mr. Robert Brutton nor Mr. Tilley, nor the representatives of Mr. Tilley, could have maintained any action or suit against Mr. Charles Brutton in respect of that sum. The statements therefore in the deed are of course importantly inaccurate.

* The general intention of the deed to be collected from its contents — to which alone we can look, for there is no suit or proceeding before us for varying or reforming the deed — was to give a security to Mr. Charles Brutton for what he had advanced or what he was a surety for; the deed, as it appears to me from the only source to which we can look for information and assistance on the subject, not having been intended at all for the benefit of Mr. Robert Brutton. Then the question is, whether, looking at the position in which Mr. Charles Brutton stood with regard to the deed, and with regard to Lord Devon and Lord Courtenay, he can possibly maintain this deed as a security for the sum which, whether without or with any proper intention (it is

not necessary to impute to him any improper intention), he in effect represented to Lord Courtenay as being a debt for which he Mr. Charles Brutton was liable. It seems to me that Mr. Charles Brutton was not in a position to entitle him to maintain it, and that Lord Courtenay and Mr. Lake, the plaintiff, standing in his place, have a right to say, that, so far, the security was obtained by misrepresentation, — misrepresentation known to be misrepresentation by the person who made it, from whatsoever motive it may have proceeded. Sir WILLIAM GRANT said, in a well-known case, that the person to whom a fact is misrepresented is not bound to dive into the secrets of the heart of the other for the purpose of ascertaining the motive from which the misrepresentation sprang, and that it is sufficient for him to show that the representation was not founded in fact. These conditions are fulfilled here. It appears to me, therefore, that neither Mr. Charles Brutton, nor Mr. Robert Brutton as claiming through him, can derive any benefit from that portion of the instrument which proceeds and is founded upon these misrepresentations. That is the mode in which the

Master of the Rolls has viewed and dealt with the matter,
 * 450 and I agree with him * entirely. That part of the security must fail, and the account to be taken must accordingly be taken in the manner which the decree of the Master of the Rolls has provided for and with clearness expressed.

It has been said, however, and very well argued, that there is a point in the case which has not been noticed in the judgment; namely, that although Mr. Charles Brutton was not at the time liable to Mr. Robert Brutton or to Mr. Tilley for the debt, yet at the time there was property of Mr. Charles Brutton's in the shape of railway shares pledged to Mr. Robert Brutton for the debt or at least part of the debt, and therefore, although Mr. Charles Brutton was not personally liable for the debt or any part of it as represented, yet that his property to a certain extent was, and it therefore might well be within what we call the equity of the deed to give so far the benefit of it. Now I pass over the circumstance that this property was subsequently redelivered by Robert Brutton to Charles Brutton. It may possibly have been delivered on the faith of the security. The argument, however, has no place unless we arrive at the conclusion that the railway shares had been deposited at the time of the deed, so that at the time of the deed the property of Charles Brutton was liable for the debt although his

person was not. I am unable to arrive at the conclusion that the position has been established that the shares were deposited before or at the date of the deed. There is certainly a statement in the answer of Charles Brutton which may and probably ought to be read as stating that they were. That, however, is directly at variance with the distinct assertion of the present plaintiff, that the deposit was made in the year 1848, and the burden of proof in this respect being wholly upon those who assert and desire to maintain that the railway shares had been at this time deposited, I am * obliged to say that they have not discharged * 451 themselves of their burden, and therefore, that in no sense can that relation of suretyship essential to support this part of the deed be said to have existed.

Another point has been made in the argument, with which the Master of the Rolls also did not think it necessary to deal. I mean the question, whether the bill should not have been dismissed as to the policy of insurance on Lord Devon's life which it is one object of the bill to make available for the indemnity so far as it will go of Lord Courtenay against the obligations which he incurred as surety for Lord Devon, and it is said that in no possible view of the case can relief be obtained in this respect, inasmuch as it is said that there was a specific contract for indemnity of a certain kind on certain property not extending to this, and therefore that that which is expressed makes that which is not expressed cease, or deprives it of effect. And it is also suggested that the security did not exist at the time of the date of the deed, that it came into existence afterwards, and therefore could not form part of the contract at the time, and that it was within the power therefore of the creditor to deal with it as he chose without the consent of the surety, and that he has done so.

Now, with regard to the express contract, I was very much struck with that argument at the time, and I am not quite prepared to say how I should have dealt with that part of the case if it had been shown that Lord Courtenay, the surety at the time of the transaction of 1847, had notice of the security, — had notice that the policy, of which no mention was made in the instrument, was in the hands of Mr. Charles Brutton the creditor. But it is the case on both sides that Lord Courtenay was ignorant of that. It may be that each party to the transaction * had * 452 forgotten it. Lord Courtenay was no party to the transaction,

and, it appeared, had no knowledge of it. It cannot, therefore, be inferred against him that there was an intention upon his part to deprive himself of a benefit of the existence of which he had neither knowledge nor notice, and as it is clear that a surety paying the debt is entitled to the benefit of all the securities held by the creditor, whether the surety be aware of them or not, it is equally clear, I apprehend, that the surety is entitled to the same benefit, notwithstanding that he takes a particular indemnity upon other property, at least when he is not informed that the property which he afterwards seeks to make available might at the time have been made available for his protection or indemnity. Upon the assumption, therefore, which seems to be correct, that this document was in the hands of Mr. Charles Brutton at the date of the deed of 1847, and had been deposited with him, Lord Courtenay's rights to that, otherwise clear, are not affected by the circumstance of the specific indemnity for which he contracted.

It is said, however, in effect, that Mr. Charles Brutton, and Mr. Robert Brutton in his place, are entitled to treat this matter as a security newly contracted for, by reason of the assignment of 1848, made of course at a time distinct from that of the transaction of 1847, and considerably later. In my apprehension, however, that assignment makes no difference in the case, for it was not substantially more for any present purpose than giving evidence and formality to the title which was in existence, by reason of the deposit at the time when the deed of 1847 was executed.

It has been very well and properly urged on the part of * 453 Robert Brutton that even although this is a question * between equities, yet as he is in effect the purchaser of the policy in question from his brother for valuable consideration without notice the Court ought not to be active against him, and, therefore, the bill ought so far to be dismissed. How I should have been disposed to deal with this part of the case if it had been established to my satisfaction that Robert Brutton did take the assignment subsequent to 1848 from his brother without notice of any other title or any earlier title, I need not say, but considering that as I understand it (and I wish to be corrected if I am wrong) Robert Brutton does not deny notice of the security of 1847, and considering that the security of 1847 does plainly show the relation of principal and surety between Lord Devon and Lord Courtenay, and considering the guarded and particular language in

which that which has been alleged to be a denial of notice is expressed in the answer, I find it impossible to accede to the position that Mr. Robert Brutton can, on the materials before us, be treated as a purchaser of the policy or its benefit without notice.

For these reasons I think it would have been wrong to dismiss the bill as to the policy on Lord Devon's life, which has been very properly so much the subject of observation and discussion. It was right, I think, as the decree has in effect done, to reserve for further consideration all matters belonging to that policy. It was right in the decree to confine itself to the restricted and guarded account which the Master of the Rolls has directed, and it appears to me, therefore, that the decree is altogether right.

THE LORD JUSTICE TURNER. — My learned brother's opinion agreeing entirely with * that of the Master of the Rolls, * 454 it is unnecessary for me to give any opinion upon the case. My acquaintance with some of the parties interested in the subject-matter of the suit renders me desirous not to do so.

ATTERBURY v. WALLIS.

1856. June 6. July 10. Before the LORDS JUSTICES.

A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage. *Held*, that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage (his fraud not excluding the effect of such notice), and took subject to it, except to the extent of the money paid by him in satisfaction of the first mortgage.¹

Semble, by L. J. TURNER, that even if the second mortgagee had not been the solicitor of the new mortgagee, the omission on the part of the new mortgagee to require production of the second mortgage-deed was such negligence as to postpone him.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 674, 675; 2 Sugden V. & P. (8th Am. ed.) 766 *et seq.*, 766, 767-771 and note and cases cited; Lloyd v. Atwood, 3 De G. & J. 614; Perry Herrick v. Atwood, 2 De G. & J. 21; Stephenson v. Royce, 5 Ir. Ch. 401; Hewitt v. Loosemore, 9 Hare, 449.

THIS was an appeal from a decision of the Master of the Rolls refusing a part of the relief sought by the appellant's bill, and holding him not entitled to redemption without paying a mortgage debt by which he insisted that he was not affected.

By indentures of lease and release, dated the 22d and 23d of May, 1838, James Parsons conveyed to John Lampray, among other hereditaments, seven freehold houses situate at Warwick, in fee as security for the repayment to John Lampray of the sum of 450*l.* then lent by him to Parsons, with interest, subject as to the seven houses to a prior mortgage in fee to Sarah Jane Warder, made in 1835, for securing 350*l.* and interest.

By indentures of lease and release dated the 28th and 29th of May, 1838, and made between John Lampray of the one part, and John Dent, Francis Atterbury, and Thomas Johnson of the other part, reciting the mortgage to Lampray, and that the sum * 455 of 450*l.* secured * thereby was due to Lampray, and also that certain other sums of 200*l.*, 300*l.*, 100*l.*, 100*l.*, and 100*l.* secured as therein mentioned, were respectively due to Lampray, Lampray assigned to Dent, Atterbury, and Johnson the several sums of 450*l.*, 200*l.*, 300*l.*, 100*l.*, 100*l.*, and 100*l.* and also all deeds, writings, notes, bonds, and securities whatsoever in the custody of Lampray relating to the said several principal sums as security for the repayment to Dent, Atterbury, and Johnson of the sum of 1000*l.* then lent to Lampray, and interest.

The deed on which the question arose was an indenture dated the 26th of April, 1839, and made between Sarah Jane Warder of the first part, Lampray of the second part, Parsons of the third part, and the respondent Thomas Wallis of the fourth part, whereby, after reciting the above securities of Mrs. Warder and Lampray, but suppressing entirely the deeds of the 28th and 29th of May, 1838, it was witnessed, that in consideration of a sum therein mentioned to have been paid to Mrs. Warder in satisfaction of her mortgage, and in consideration of 222*l.* 16*s.* 8*d.* paid to Lampray in part satisfaction of the amount due to him on his mortgage, and of a further sum paid to Parsons, making in all 800*l.*, Mrs. Warder, Lampray, and Parsons released the seven houses to Wallis in fee, free from Mrs. Warder's and Lampray's mortgages, but subject to redemption on payment of the 800*l.* and interest. The deed contained the following covenants:—

[354]

“ And each of them the said Sarah Jane Warder and John Lampray (so far only as concerns their own respective acts, deeds, and defaults) doth hereby for herself and himself, her and his heirs, executors, and administrators, severally covenant and declare with and to the said Thomas Wallis, his heirs and assigns, that they, the said Sarah Jane Warder and John Lampray *(each covenanting separately as aforesaid) have not nor * 456 hath either of them at any time heretofore made, done, or executed any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said hereditaments and premises expressed to be hereby appointed, granted, or released, or any part thereof, with their appurtenances, are, is, can, shall, or may be impeached, charged, burdened, incumbered, or prejudicially affected in any manner howsoever: and the said John Lampray, for himself, his heirs, executors, and administrators, doth hereby further covenant with the said Thomas Wallis, his heirs, executors, administrators, and assigns, that he the said John Lampray, his heirs, executors, administrators, and assigns, shall and will at all times hereafter (unless prevented by fire or other inevitable accident) at the request of the said Thomas Wallis, his heirs, executors, administrators, or assigns, and at the expense of the said mortgaged premises, produce or cause to be produced unto him and them, or to his and their counsel, attorney, solicitor, or agent, or at any trial or hearing in any court of law or equity, or upon the execution of any commission for examination of witnesses, or otherwise as occasion shall require, the said recited indentures of the 22d and 23d days of May, 1838, and at the like request and expense (unless prevented as aforesaid) make and deliver true and attested or other copies of the same indenture or either of them: provided always, and it is hereby declared, that the covenant lastly hereinbefore contained shall bind the said John Lampray, his heirs, executors, or administrators, so long only as the deeds so by him covenanted to be produced shall be in his or their possession or control; and after he or they shall have ceased to have the possession or control of the said deeds the personal liability of the said John Lampray, and through him the liability of his heirs, executors, and administrators, shall cease and determine.” * “ And lastly, that when and so soon as the * 457 principal moneys and interest secured to the said John Lampray, his executors, administrators, and assigns, as aforesaid

shall be paid, and the above recited indentures of lease and release of the 22d and 23d days of May, 1838, shall cease to be in his or their custody or power, he the said James Parsons, his heirs or assigns, shall and will at all times thereafter (unless prevented by fire or some inevitable accident) at the request of the said Thomas Wallis, his heirs, executors, administrators, or assigns, but at the expense of the said James Parsons, his heirs, executors, or administrators, produce or cause to be produced unto the said Thomas Wallis, his heirs, executors, administrators, or assigns, or to his or their counsel, attorney, solicitor, or agent, or at any trial or hearing in any court of law or equity, or upon the execution of any commission for examination of witnesses, or otherwise as occasion shall require, uncanceled and undefaced, the said last above recited or mentioned indentures, or either of them, for the manifestation and defence of the title of the said Thomas Wallis, his heirs, executors, administrators, and assigns, as such mortgagee or mortgagees as aforesaid to the hereditaments and premises hereby granted and released, or intended so to be; and at the like request and expense make and deliver to the said Thomas Wallis, his heirs, executors, administrators, or assigns, attested or other copies of the same indentures or either of them, or extracts therefrom."

Mr. Francis Atterbury survived his co-submortgagees, and died in 1849, and the suit was instituted by his representatives, seeking to redeem the seven houses on payment only of the amount which Wallis had paid to Mrs. Warder in satisfaction of her mortgage.

The bill stated that Lampray had acted as the solicitor
 * 458 * of all parties on the occasion of the conveyance to Wallis, and charged the defendant with negligence in not calling for the production of Lampray's mortgage-deed, which had, ever since the execution of the deeds of the 28th and 29th of May, 1838, been held by the parties claiming under those deeds.

The defendant by his answer denied that he had employed Lampray as his solicitor in the transaction, and alleged that he had employed no solicitor at all, and that, being ill at the time, he had left the conduct of the matter to his brother, who was a corn dealer, and who, as well as Lampray, had since died.

The Master of the Rolls held that there was not sufficient evidence to show that Lampray was the solicitor of Wallis and that Wallis had not been guilty of culpable negligence in not calling

for the production of the deeds of the 22d and 23d of May, 1838, as they related to other property besides the seven houses, and his Honor decreed that the plaintiffs could only be admitted to redeem by paying the whole amount due on Wallis's security.

From this decision the plaintiffs appealed.

Mr. Baily and *Mr. W. D. Evans*, in support of the appeal. — First, the evidence is sufficient to show that Lampray acted as solicitor for the respondent on the occasion of the mortgage to the latter. But if even this was not established, and the respondent ought to be dealt with on the principle laid down by the Master of the Rolls, namely, as if he had not had a solicitor, still his omission to call for the production of the deeds creating one of the mortgages, which the deed purported to discharge, * consti- * 459 tuted such *crassa negligentia* as must postpone his security to the appellants, on the ground of constructive notice of the appellants' security, as the production of the deeds of the 22d and 23d of May, 1838, would have disclosed in whose custody they were.

They referred to *Kennedy v. Green*, (a) *Finch v. Shaw*, (b) *Roddy v. Williams*, (c) *Jackson v. Rowe*, (d) *Worthington v. Morgan*. (e)

Mr. Lloyd and *Mr. Erskine*, for the respondent Wallis. — First, there is no evidence of Lampray having been Wallis's solicitor ; all the evidence is to the contrary. The single circumstance of there being only one solicitor in the transaction did not constitute him the solicitor for both parties. (g) Even if he had been Wallis's solicitor, still the presumption that he would communicate to Wallis the existence of the plaintiffs' submortgage could not arise, for its concealment was part of the fraud from which, if either party was to suffer, it ought to be his regular clients, the plaintiffs' testator and his co-submortgagees, and not the client, to whom construction of law alone (if any thing) attributes him as a solicitor.

(a) 3 Myl. & K. 699.

(d) 2 Sim. & St. 472.

(b) 19 Beav. 500.

(e) 16 Sim. 547.

(c) 3 Jo. & Lat. 1.

(g) See *Espin v. Pemberton*, 3 De G. & Jo. 547.

In *Kennedy v. Green*, (a) which is relied upon on the other side, Lord BROUGHAM said: "Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself if obtained while so employed and on the same business (for I do not at * 460 all differ from *Mountford v. Scott*, (b) *Hiern v. Mill*, (c) * and the other cases), yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud practised by Bostock upon Mr. Kirby himself was of course concealed from him, and so we may say would certainly be that other fraud which he had practised on Mrs. Kennedy. Indeed, that was only another part of the same fraud, another act of the same plot; and therefore, I think, we cannot on this account alone fix his client Mr. Kirby, any more than his other employer Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge, he had of his own fraud, and are not to hold Mr. Kirby as cognizant—I mean, of course, cognizant, in law and constructively—of that, merely because his solicitor himself the contriver, the actor, and the gainer in the transaction, knew it all well." Nor is there any ground for attributing gross negligence to Wallis. The deeds of May 22d and 23d, 1838, related to other property besides the seven houses, and consequently Wallis had no right to call for them, nor was their absence a ground for suspicion. Neither in *Jackson v. Rowe* (d) nor in *Worthington v. Morgan* (e) was there any cause of fraud, or consequently any inducement to give a false answer to inquiries for the absent documents. The plaintiffs' testator and his co-submortgagees were themselves guilty of negligence in not giving notice of their security to Parsons, the mortgagor; and the plaintiffs are, at all events, too late in advancing this claim after so long a time, and after the deaths of the persons who could have given an account of the transaction.

They referred to *Hewitt v. Loosemore*, (g) *Ware v. Lord Egmont*, (h) *Stocks v. Dobson*. (i)

(a) 3 Myl. & K. 699-720.

(e) 16 Sim. 547.

(b) 3 Mad. 34.

(g) 9 Hare, 449.

(c) 13 Ves. 114.

(h) 4 De G., M. & G. 460.

(d) 2 Sim. & St. 472.

(i) 5 De G. & Sm. 760; 4 De G., M. & G. 11.

* *Mr. Pemberton*, for the mortgagor Parsons.

* 461

Mr. Erskine, in reply.

Judgment reserved.

July 10.

THE LORD JUSTICE KNIGHT BRUCE. — The defendant James Parsons, seised of the tenements in question in this cause, mortgaged them in the year 1835 to Mrs. Sarah Jane Warder. The mortgage carried the legal estate to her. Afterwards, in the year 1838, Parsons, owing money to Mr. Lampray (a solicitor), mortgaged the equity of redemption to him; very soon after which Lampray, in the same year, made a mortgage to certain persons, under whom the plaintiffs claim, for securing a considerable sum to those persons. The property comprised in this mortgage included the mortgage which had been made to Lampray by Parsons. The deed from Parsons to Lampray bears date the 23d of May, 1838. The deed from Lampray to those under whom the plaintiffs claim is dated the 29th of May, 1838.

Parsons, in the year 1839, borrowed 800*l.* of Thomas Wallis, a farmer, and by arrangement between him (or his brother, Stephen Wallis on his behalf) and Mr. Lampray, Mr. Parsons, and Mrs. Warder, this sum was as to part applied in paying to Mrs. Warder the amount due on her security, and as to the residue paid to Messrs. Lampray and Parsons in unequal proportions, whereupon, for securing the 800*l.* with interest to Thomas Wallis, the tenements in question were conveyed to him by Parsons by way of mortgage, in which conveyance Mrs. Warder and Mr. Lampray joined — the former for the purpose of passing the legal estate and all her interest in them — the latter for the purpose of transferring or *releasing all his interest in them. This *462 mortgage-deed, dated the 26th of April, 1839, mentioning in terms the deed of mortgage to Lampray, is perhaps so worded as to assert in effect that on the 26th of April, 1839, Lampray had in his possession the deed of the 23d of May, 1838. Wholly silent as to the mortgage by Lampray of the 29th of May, 1838, just as if no such instrument existed or had ever existed, the mortgage of 1839 contains on the part of Lampray these covenants: [His Lordship read the covenants against incumbrances and for produc-

tion.] And in the same deed (the mortgage of 1839) Parsons covenants thus : [His Lordship read the covenants for title.]

The mortgage-deed of the 23d of May, 1838, made to Lampray, which seems to have extended to property not affected as well as that affected by the mortgage of 1839, was, however, not in Lampray's possession or power at the time of the execution of the mortgage-deed of 1839, or when Thomas Wallis advanced his money, but must upon the evidence be taken to have been before and in and throughout the year 1839 in the possession of those under whom the plaintiffs claim, a possession referable certainly to their title under the mortgage of the 29th of May, 1838, as to which, as I have said, the mortgage-deed of 1839 is silent.

It is this mortgage by Lampray to those under whom the plaintiffs claim that has given rise to the contest before us, the plaintiffs asserting their right to the benefit of it against Thomas Wallis and against the defendants (Messrs. Ball) who claim under him ; while Thomas Wallis in his lifetime contended, and his representatives now contend, that Thomas Wallis, having acquired the legal estate, and having, as he said and as they say, no notice before that acquisition or before paying the 800*l.* of the mortgage made * 463 by Lampray, that mortgage did * not affect Thomas Wallis and does not affect those who represent him.

This point, very well argued before us in the course of the last term, we have to decide ; and the first question for determination, — or at least a question which we may properly determine, — has seemed to me to be, whether Mr. Lampray acted professionally as a solicitor in the matter of the advance of the 800*l.* in 1839 and the security of that year, and, if so, for whom. And upon the pleadings and evidence before us I am satisfied that in and throughout that matter Mr. Lampray was and acted as solicitor, not only for himself and Mr. Parsons, but also for Mr. Thomas Wallis ; in saying which I do not mean to impute dishonesty to the answer of Thomas Wallis in the cause. He seems not to have interfered personally in the transaction. I am also satisfied that this connection between him and Lampray affected the deceased defendant at the time with notice of what Mr. Lampray then knew touching his own previous dealing with the debt of which he received payment or part payment from the late defendant. It cannot, in my opinion, be believed or supposed either that the deed of mortgage to Lampray was represented or considered to have been destroyed,

lost, or mislaid, or that during any part of the year 1839 Lampray had forgotten or was not fully alive to the fact that that deed had been delivered to the mortgagees under the deed of the 29th of May, 1838, in that character. I find it equally impossible to believe that in the transaction of the advance of the 800*l.* and taking the security for that sum, Messrs. Wallis, of whom neither was of the legal profession, were wholly without a solicitor, wholly without reliance on professional advice, wholly without professional assistance. Yet that must be the conclusion if Mr. Lampray did not act in the matter as their solicitor; that is to say, as solicitor for * the deceased defendant. The professional * 464 charges, if any, of Mr. Lampray in the business could not according to ordinary course or practice fall even partially on Messrs. Wallis or either of them.

It has been contended that Lampray having, as it is said, committed a fraud which he must, it is also said, be supposed to have kept from the knowledge of the deceased defendant and of his agent Mr. Stephen Wallis, therefore there was no notice to them, and the case of *Kennedy v. Green* was cited as an authority for the position. My opinion, however, is that the fraud (if any) or concealment (if any) practised by Lampray on Messrs. Wallis, or either of them, is immaterial so far as the plaintiffs are concerned, whose case appears to me to stand on the same footing for every purpose of the present controversy as if Lampray had been directly and distinctly proved to have expressly told Messrs. Wallis before payment of any part of the 800*l.* why it was that he had not the deed of 23d of May, 1838, and where that instrument was at the time. Upon the hypothesis—in my opinion, as I have said, warrantable and correct—that Lampray acted as solicitor for the deceased defendant, it is, I think, the right of the plaintiffs to assume that Lampray apprised the deceased defendant of the facts known to Lampray. They, the plaintiffs, appear to me to have no concern with the question whether in truth the duty that Lampray owed to Thomas Wallis or Stephen Wallis was broken or neglected or not. If in the business of 1839 Lampray had not been and a different solicitor had in his stead been concerned professionally for Thomas Wallis, none will deny that express notice of the mortgage of the 29th of May, 1838, given in the course of the business to that solicitor would have been notice to Thomas Wallis, — whether he or Stephen Wallis actually received information

* 465 of the notice or not; * whether the solicitor (not being in collusion with the mortgagees of the 29th of May, 1838) fulfilled his duty to Thomas Wallis or not. But it would have been merely superfluous to give notice in April, 1839, to Lampray, then acting in a matter immediately touching property mortgaged by him less than a twelvemonth before, of that mortgage, as to which necessarily in and throughout the year 1839 he knew that he was in that year both mortgagee and mortgagor. Were he here swearing that in April, 1839, the mortgage of the 29th of May, 1838, had escaped his recollection he could not be believed by any reasonable being.

It is argued that the claim raised by the appeal was in effect barred by the conduct at least in and after the year 1845, and the alleged laches, of the plaintiffs or those whom they represent, and by the loss of evidence caused by the deaths of Lampray and Messrs. Wallis. That argument, however, seems to me unfounded. I do not see that there has been any concealment or misrepresentation or any inexcusable delay or any unfairness on the part of the plaintiffs, or any of those in whose place they stand, and if any damage has happened, though I do not believe any to have happened, to the estate of the deceased defendant by his death (his answer, however, in the cause being before us), or by the death of Lampray or that of Stephen Wallis, who acted as agent for the deceased defendant, it must be submitted to.

I think the plaintiffs entitled to the priority which they claimed, that is, I consider their rights under the deed of the 29th of May, 1838, to be the same as if in the deed of mortgage to the late defendant Thomas Wallis of the 26th of April, 1839, there had been inserted a clause declaring that instrument to be without prejudice to those rights.

* 466 * THE LORD JUSTICE TURNER. — In this case the defendant Wallis has the legal estate, and he must, therefore, prevail in the contest before us, unless he can be affected with notice of the plaintiffs' claims before he took the estate and paid the money which he advanced upon it. The question to be determined, therefore, is whether he can be affected with such notice, and I am of opinion that it must be imputed to him. I think, and for the same reasons as I assigned in *Hewitt v. Loosemore*, that Lampray must be considered to have been Wallis's solicitor

in the transaction of the mortgage to him, and the consequences of his being so considered are not in this case displaced by any such facts as were contained in the passages which in that case were read from the answer and were considered by me to be sufficient to displace those consequences.

The case of *Kennedy v. Green* was much relied on upon the part of the defendant in the argument upon this part of the case, but I thought in *Hewitt v. Loosemore*, and I continue to think, that that case does not govern cases like the present. In that case there was fraud, independently of the question whether the act which had been done was made known or not. In such cases as the present the question of fraud wholly depends upon whether the act which has been done has been made known or not.

I continue, also, to be of opinion that the authorities warrant the positions stated in *Hewitt v. Loosemore* as to inquiries for deeds and as to the consequence of such inquiries not being made, and I am of opinion that, upon both the points which were ruled in *Hewitt v. Loosemore*, this case must be decided in favour of the plaintiffs. It will of course be understood that I have thus referred to * the case of *Hewitt v. Loosemore*, not from any * 467 weight which is due to that case, but simply as the best means of explaining the view which I take of the case before us.

It was argued on the part of the defendant that the doctrine of constructive notice had been restricted by the Lord Chancellor in the case of *Ware v. Lord Egmont*, (a) but the Lord Chancellor in that case points to the distinction in cases of gross or culpable negligence. The case of *Stocks v. Dobson* (b) was also referred to in the argument, but that was a mere case of equities.

It was urged, also, that there was delay on the part of the plaintiffs, but the circumstances of the case are sufficient to account for the delay.

My opinion, therefore, agrees with that of my learned brother, and the decree must be altered accordingly.

(a) 4 De G., M. & G. 460 [and notes].

(b) 5 De G. & Sm. 760; 4 De G., M. & G. 11.

1856. July 10. Before the LORDS JUSTICES.

The plaintiff left his residence shortly after filing his bill, but continued to pay rent for it. The defendants were unable to find him, or to obtain any information from his solicitors as to where he was: *Held*, a case for requiring security for costs.¹

THIS was an appeal from an order of Vice-Chancellor WOOD, ordering the plaintiff to give security for costs. The bill was filed on the 2d of May, 1855, and the plaintiff was described in it as of a particular address at Louth in the county of Lincoln, labourer. In March, 1856, the bill was amended by making the respondent a defendant. Upon inquiries by the respondent at a cottage which was the address set forth in the bill, it appeared that soon after filing the bill the plaintiff had quitted the cottage and locked it up. By his affidavit, in opposition to the application for security for costs, he stated that although he had never since resided there he had paid rent for the cottage up to the last half-year and had only left it for a temporary purpose, leaving his furniture there, and that his wife still occasionally lived there. From the affidavits in support of the motion, it appeared that he was concealing himself in order to avoid payment of the costs of some proceedings at law and that his solicitors refused to give information as to his present address.

Mr. Roxburgh and *Mr. Locock Webb*, in support of the appeal motion, cited *Fraser v. Palmer*, (a) *Hurst v. Padwick*, (b) *Manby v. Bewicke*, (c) and submitted that *Bailey v. Gundry* (d) had not been followed.

* 469 After some discussion the plaintiff's solicitor agreed * to give his own personal undertaking to be liable for costs to the usual amount.

(a) 3 Y. & C. 279.

(c) 3 W. R. 646.

(b) 12 Jur. 21.

(d) 1 Keen, 53.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 27, and cases in note (7), 358.

Mr. Cairns and *Mr. Toller*, for the respondents, asked for the costs of the appeal.

Mr. Roxburgh and *Mr. L. Webb* insisted that although a concession had been made the order was not correct, and that the appeal was well founded.

THE LORD JUSTICE KNIGHT BRUCE. — I see no substantial difference between the case of a plaintiff out of the jurisdiction and that of a plaintiff hiding himself within the jurisdiction. I think that the circumstances here warranted the order made. Had the case been new, which as I believe it is not, I think that I should have been prepared to make a precedent.

THE LORD JUSTICE TURNER. — Though I, also, should have been prepared to make a precedent, I prefer following precedents. Points like this do not often find their way into the reports, but I can say, from my own recollection of the practice at the rolls, that *Bailey v. Gundry* was always followed there.

Appeal motion refused, with costs.

* MANBY v. BEWICKE. (No. 2.).

* 470

1856. July 10, 14. Before the LORDS JUSTICES.

The common affidavit as to documents is not the subject of cross-examination.¹

THIS was a motion by way of appeal seeking to discharge an order of the Vice-Chancellor WOOD, appointing a special examiner to cross-examine one of the defendants on an affidavit made by him on the usual summons as to documents in his possession or power.

Mr. Cairns and *Mr. Toller*, for the appellant. — The question is, whether an affidavit not made in support of the defendant's case,

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1823, and cases in note (9).

but on the compulsion of a summons and in the nature of an answer, for which, as to this, it is merely a substitute, can be the subject of cross-examination any more than an answer can. This depends on the construction of the 38th and 40th sections of the Chancery Practice Amendment Act. Now the 38th section only applies to evidence after issue joined. The 40th (a) is * 471 therefore the only section which * it is necessary to consider. The terms of it, however, do not apply to a compulsory affidavit. If they did, as cross-examination is unlimited, a party, even a defendant, could, by means of a summons as to documents, entitle himself to cross-examine his opponent generally, long before the cause was at issue. The Vice-Chancellor decided the case not upon his own view of the section, but because he was under the impression that the point had been decided by your Lordships in *Kay v. Smith*. (b) That, however, was, we submit, a misapprehension. They also referred to *Lamb v. Orton*. (c)

Mr. Roxburgh and *Mr. Locock Webb*, for the plaintiff. — The words of the 40th section are perfectly general, and the object is to extract the truth. There can be no reason why the affidavit as to documents should be more protected in this respect than any other; indeed, as it was intended to save the expense of exceptions to answers, there is every reason why it should be subject to the test of cross-examination.

Mr. Toller, in reply.

Judgment reserved.

(a) The 40th section of the Chancery Improvement Act is as follows: "Any party in any cause or matter depending in the said Court may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said Court, or before an examiner especially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used, on any claim, motion, petition, or other proceeding before the Court, shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined. Provided always, that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case."

(b) 3 W. R. 622.

(c) 1 Drew. 414.

July 14.

THE LORD JUSTICE KNIGHT BRUCE. — The Vice-Chancellor Wood considered it incumbent on him to make the order under appeal, whether in conformity * or not in conformity with * 472 his own opinion. He thought so by reason of the case of *Kay v. Smith*, decided by ourselves, in affirmance of an order made at the rolls, and probably if that order was such, and so circumstanced, as the Vice-Chancellor deemed it to have been, his Honor could scarcely have taken any other course than he did. I am not sure that the rolls' order in *Kay v. Smith* was such and so circumstanced as the Vice-Chancellor understood it to have been. If it was, the Master of the Rolls and ourselves were, I conceive, in error, for the order under appeal is, in my judgment, an order authorized neither by the 40th section of the Statute of the 15 & 16 of the Queen, c. 86, nor by the course or practice of the Court.

The motion before us ought, I think, to succeed; in coming to which conclusion, I do not believe that I am substantially differing from the learned Vice-Chancellor, though possibly I may be differing from what my learned brother and myself did in *Kay v. Smith*. I repeat, that according to my judgment the affidavit in question here, which, relating merely to documents, was made at the instance and upon the requisition of the plaintiff, and not in any sense as I understood the matter "volunteered" by either deponent, was not "made to be" nor has been used on "any claim, motion, petition, or other proceeding before the Court" within the meaning of the 40th section of the statute already mentioned, so as to render either deponent liable upon it or by reason of it to cross-examination at the present or any past stage of the cause.

THE LORD JUSTICE TURNER. — In this case the plaintiff obtained an order for the production of documents, and one of the defendants in * the usual course made an affidavit in the * 473 ordinary form. The plaintiff then obtained an order to cross-examine this defendant, and the present motion is to discharge that order.

I am of opinion that it ought to be discharged. The question depends on the proper construction to be put on 15 & 16 Vict. c. 86, § 40, for before that statute no such order could be made, and no light can consequently be obtained from any antecedent prac-

tice. [His Lordship read the 40th section, see *ante*, p. 470, note.]

It is worthy, perhaps, of remark, that the words "claim, motion, petition, or other proceeding" in this section must, as I conceive, be taken to mean a claim, motion, petition, or other proceeding on which evidence may be received. For there are two divisions of the section, one as to witnesses and the other as to parties, in each of which the same words occur. As to the former division, that is as to witnesses, it is clear that the meaning must be such as I have mentioned, for according to the provision the witnesses are to attend and be examined for the purpose of evidence being used. And this being the meaning of the words in the first division, the same meaning must, I think, be attached to them in the second.

This, however, does not dispose of the case before us; for the affidavits, though not made to be used upon a motion, petition, claim, or other proceeding on which evidence can be received, may still be used on such a proceeding. We must examine, therefore, further, the second branch of the section. Now the words are "any party having made an affidavit to be used or which shall be used," &c. Do these words "to be used or which

* 474 * shall be used," refer to user by the party making an affidavit, or by the opposite party. I think that they clearly refer to user by the party making the affidavit. For the plain object of the enactment is, that parties making affidavits should not have the benefit of them without being subjected to cross-examination. Then how stands the case as to affidavits made under orders for production of documents? Such affidavits are used against and not for the party making them. The party making them may, indeed, have occasion to give and may give notice to read them on some claim, motion, petition, or other proceeding before the Court, and, if he does so, may subject himself to cross-examination. But until he does so, I do not see how such affidavits can be said to be affidavits to be used or which will be used by him.

These considerations would alone be sufficient to dispose of the case, but the subsequent proviso seems to me to throw further light on the case. [His Lordship read it.] This language, I think, shows that the cases which were in the contemplation of the legislature were those in which interim orders might be made by the Court, and not cases on the production of documents, on many, if

not most of which, no order follows on the affidavit, no further order being necessary where the affidavit raises no objection to the production.

I may add, that both convenience and justice seem to me to require, that the construction which we have put upon this section of the statute should be adopted in preference to the wide construction of it contended for on the part of the respondent.

It is due to the Vice-Chancellor to add also, that our * decision in the case of *Kay v. Smith* as reported may well * 475 have misled him, as we understand it to have done in this case; but I certainly did not mean in that case to go the length that has been contended for in this. My understanding in that case was, that the cross-examination was to be upon the affidavit only, the more so as the defendant had been already cross-examined on merits. I now think that the case was not rightly decided even to that extent, for I do not see what power the Court had to direct any cross-examination on the ground of such an affidavit having been made.

It was said at the bar that these orders are always drawn up for cross-examination "on the affidavit." If it be so, I think the sooner the form of them is altered the better, for it does not express which is meant; viz., that the witness having made an affidavit should attend and be cross-examined.

* MANBY v. BEWICKE. (No. 3.)

* 476

1856. July 10. Before the LORDS JUSTICES.

A defendant in his answer stated that, to the best of his knowledge, information, and belief, the documents which he admitted to be in his possession relating to the matters mentioned in the bill did not, nor did any of them, in any way, make out, evidence, or tend or support or tend to make out, evidence, or support the case or any part of the case made by the plaintiff, nor defeat or impeach or tend to defeat or impeach the case or defence, or any part of the case or defence of the defendant, but were evidence in support of the defendant's case. It appeared, however, on the face of the answer, that the defendant had not himself inspected the documents: *Held*, that upon this statement they were not protected from production.¹

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1822, 1823, 1831.

THIS was an appeal from an order of Vice-Chancellor Wood directing the production by the appellants of certain documents admitted by their answer to be in their power.

The answer contained the following paragraphs : —

“ Our belief of the several matters hereinafter stated, as well in support of our respective cases as in defence to the plaintiff’s case, we having no personal knowledge thereof, is grounded upon information to that effect obtained for and furnished to us by Messrs. Stable & Dees of Newcastle-upon-Tyne, who are the ordinary solicitors of me this defendant C. B. Bewicke, and act as the solicitors of both of us in this suit, and such information for the most part, as we are informed by our said solicitors and believe, is derived from and appears by various documents which are now in the possession or power of us or one of us, of which a careful examination has been made by them on our behalf for the purpose of this suit, and amongst others and chiefly numerous documents which have been recently found at Close House, in the county of Northumberland, where C. Bewicke deceased, in the plaintiff’s bill and hereinafter named, resided in his lifetime, and which documents upon being so discovered came into and are now in * 477 the possession or * power of me this defendant C. B. Bewicke, the devisee for life in possession under the will of the said C. Bewicke deceased hereinafter mentioned.”

“ We say, I the defendant T. W. Craster speaking to the best of my information and belief, that there are now, and in part under the circumstances mentioned in the first paragraph of this our answer, in the possession or power of me the defendant C. B. Bewicke the several documents mentioned and referred to in the second schedule hereunto annexed, to which we crave leave to refer as part of this our answer ; and we further say, I the defendant C. B. Bewicke speaking to the best of my information and belief, that there are now in the possession or power of me the defendant T. W. Craster the several documents mentioned and referred to in the third schedule hereto annexed, to which we crave leave to refer as part of this our answer ; and we further say, that there are in our joint possession or power the several documents mentioned and referred to in the fourth schedule hereto annexed, to which we crave leave to refer as part of this our answer ; and we further say, we are advised, and to the best of

knowledge, information, and belief it is the fact, that the several documents respectively mentioned and referred to in the said second, third, and fourth schedules do not nor does any or either of such documents in any way make out, or evidence, or support, or tend to make out, evidence, or support, the case or any part of the case made by the plaintiff in his bill, and that the said documents do not nor does any or either of them in any way defeat or impeach, or tend to defeat or impeach, the case or defence made by us by this our answer, and that all such documents in fact evidence and support, or tend to evidence and support, the case or defence so made by us, and will or may be * used * 478 on our behalf by way of evidence accordingly; and we also say, that to the best of our knowledge, information, and belief, many of the documents mentioned and referred to in the said second and fourth schedules, but not including any deeds or copies or drafts of deeds therein mentioned, were procured or prepared with reference to litigation respecting the said Windsor estates, or some part thereof, then actually pending or threatened or in prospect between the said Sir R. Bewicke and J. Craster or one of them, or those claiming through them or one of them, on the one hand, and persons other than the plaintiff claiming such estates adversely as herein mentioned on the other hand; and we therefore submit and humbly insist that we respectively are not bound and ought not to be required to produce any of the documents mentioned in the said second and third schedules hereto respectively."

Mr. Cairns and *Mr. Toller*, in support of the appeal. — They referred to *Peile v. Stoddart*, (a) *Combe v. The Corporation of London*, (b) *Tyler v. Drayton*, (c) *Basford v. Blakesley*. (d)

[THE LORD JUSTICE KNIGHT BRUCE. — Ought not your allegations in the answer to be more specific? You say the documents do not tend to support the plaintiff's case. That expression is in common use, but it may be a question what a defendant in swearing to an answer understands by "the plaintiff's case."]

Mr. Roxburgh, for the plaintiff, was not called upon.

(a) 1 Mac. & G. 192.

(c) 2 Sim. & St. 309.

(b) 1 Y. & C. C. C. 637.

(d) 6 Beav. 131.

* 479 * THE LORD JUSTICE KNIGHT BRUCE. — There is in this case a circumstance which does not seem to have existed in *Peile v. Stoddart*; viz., that the defendants have not themselves looked at the documents. A statement made entirely on the faith of information received from other persons as to the documents is not sufficient to protect them from production.

The Lord Justice TURNER concurred.

The case stood over that the defendants might have an opportunity of personally inspecting the documents. Subsequently an order was agreed to for the production of some of them.

* 480 * In the Matter of the Trusts of the Will of GEORGE CRAWHALL, and of the ACT FOR THE RELIEF OF TRUSTEES.

1856. July 11, 12, 17. Before the LORDS JUSTICES.

A testator bequeathed a fund in trust for his sister A. for life, and after her death to be divided between the children of his sisters B., C., and D., who should survive the testator, such children taking *per stirpes* "with benefit of survivorship among members of the same family:" Held, that the latter words of themselves meant survivorship at the death of the tenant for life, and could not be otherwise interpreted by comparison with other bequests in the same will, showing an intention that those bequests should not go over if the legatee had children.¹

Held, also, that the survivorship applied to accrued shares.²

Where a testator bequeathed a fund in trust for the children of his late sister A. (the issue of her daughter B. excepted), and of his sisters C. and D. *per stirpes*: Held, that grandchildren of C. were entitled to participate.³

THIS was an appeal from a decision of Vice-Chancellor Wood on the construction of a bequest contained in the will of George Crawhall, dated the 31st of May, 1850, whereby, after making

¹ See 2 Jarman Wills (3d Eng. ed.), 687; *Neathway v. Reed*, 3 De G., M. & G. 18, and cases in note (1), 23, and note (1).

² 2 Jarman Wills (3d Eng. ed.), 667.

³ See 2 Jarman Wills (3d Eng. ed.), 138.

various specific and pecuniary bequests, the testator bequeathed to trustees a sum of 2000*l.* upon trusts, by reference to which the trusts of the fund in question in the suit were declared. The trusts as to the 2000*l.* were to invest that sum in manner in the will mentioned, and during the lifetime of the testator's niece, Frances, wife of William Little, to pay to her the interest and annual proceeds of the trust fund for her separate use. And the testator directed that after the decease of Frances Little the 2000*l.* and the interest and annual proceeds thereof should remain and be in trust for all or any one or more of her children, if more than one, in such shares and proportions, and whether one or more, at such age or ages, or time or times, with such conditions and in such manner, as Frances Little, whether covert or sole, should by deed or will appoint the same ; and in default of such appointment, in trust for all the children or the only child, as the case might be, of Frances Little, who * should * 481 attain twenty-one ; and if more than one, in equal shares as tenants in common ; but so that no child taking under any appointment made under the aforesaid trusts should be entitled to any further share in the unappointed part of the said trust moneys without bringing his or her appointed share into hotchpot. And the testator thereby declared that after the decease of Frances Little the trustees should, during the minorities of children presumptively entitled to share in the trust fund, apply the interest and annual produce of such shares for or towards their maintenance or education, or otherwise for their benefit. The will then proceeded to make the bequest upon which the question in the cause turned, and which was a bequest of 5000*l.* to the same trustees, upon trust to invest the same in the like stocks, funds, and securities and in like manner as the above-mentioned trust sum of 2000*l.* was thereinbefore directed to be invested, with the like power to vary the stocks, funds, and securities thereof, and to stand possessed of the said sum of 5000*l.* and the interest and annual proceeds thereof upon such and the like trusts, in favour and for the separate use of the testator's sister Jane the wife of William Walton during her life as were thereinbefore declared and contained of and concerning the said trust sum of 2000*l.* and the interest and annual proceeds thereof in favour and for the separate use of Frances Little during her life ; and from and after the decease of Jane Walton, whether before or after the said testator,

the testator directed that the said trust sum of 5000*l.* should be held in trust for, and should be divided between, persons thus described : —

“ The children of my late sister Mary Vickers (the issue of Ann Ion excepted), of my late sister Hannah Alcock, and of my * 482 said sister Frances Bates, who shall * survive me, such children taking *per stirpes*, with benefit of survivorship amongst members of the same family.”

The following were other bequests in the will which were also referred to in the argument and by the Vice-Chancellor in his judgment, as assisting the construction of the bequest in question, by showing the general intention of the testator in bequests like that in question : —

“ I give and bequeath the legacy or sum of 700*l.* to the following four children of my late niece Ann, the wife of William Ion, the daughter of my late sister Mary Vickers, namely, John William Ion, Seymour Deighton Ion, Thomas Peter Ion, and Jane Ion ; and I direct the said legacy of 700*l.* shall be divided amongst them in equal shares as tenants in common, with benefit of survivorship between and amongst them in the event of the death of any one or more of them without issue, or during my lifetime and without issue.”

“ In case any one or more of the said children of the said Jane Wooler shall happen to die under twenty-one, the legacy of the child or children so dying shall go unto and equally between the survivors or survivor of such children.”

“ And I give and bequeath the legacy or sum of 500*l.* apiece to each of my three nieces, daughters of my late sister Hannah Alcock, namely, Ann Alcock, Barbara the wife of William Farrar, and Hannah Alcock absolutely, and the legacy or sum of 1000*l.* to their brother Thomas Crawhall Alcock ; and I direct that if any one or more of the said children of my said sister Hannah Alcock shall happen to die in my lifetime without issue, the legacy * 483 of the child or children so dying shall go unto * and equally between the survivors or survivor of such children.”

“ And I hereby expressly declare, that in case any devisee, legatee, or legatees to whom a devise, legacy, or other benefit is or are

given by this my will shall happen to die in my lifetime, leaving a child or children him or her or them surviving, then the devise, legacy, or other benefit intended for such devisee, legatee, or legatees so dying (unless the same be a life-interest expressly given to him, her, or them) shall not thereby lapse, but shall be in trust for the children or child of every such devisee or legatee, if more than one, in equal shares, to vest in such child or children at the age of twenty-one years."

Ann Ion was a deceased child of Mary Vickers.

The testator died on the 6th of July, 1852, and Jane Walton on the 2d of April, 1855.

There were four children only of Hannah Alcock, viz., Thomas Crawhall Alcock, Ann Alcock, who died in the testator's lifetime without having been married, Barbara, who married Mr. Farrar and died in 1853 leaving children, and Hannah, who died in 1854 without having been married.

The 5000*l.* having been paid into Court under the Trustee Relief Act, and two-thirds of the amount having been paid out to the issue of Mary Vickers and the children of Frances Bates, Thomas Crawhall Alcock presented the petition on which the order under appeal was made, seeking payment of the remaining third to himself as the only child of Hannah Alcock who had survived the tenant for life of the fund.

* The Vice-Chancellor Wood held, that, having regard to * 484 the frame of the bequest and to the testator's intention as appearing in other parts of the will, there was not only the presumption of intention arising from the improbability of the testator having meant that the share of a child who left children should go over merely because the child died in the lifetime of the tenant for life, but an inference to be drawn from the other dispositions of the will against such a construction. His Honor thought that these provisions rendered the present case an exception to the general rule, which his Honor agreed was now well settled.

From this decision Thomas Crawhall Alcock appealed.

Mr. J. H. Palmer, in support of the appeal.—The decision under appeal strikes out from the bequest the words "with benefit of survivorship among members of the same family." According to the general rule of construction and all the authorities, the

whole fund, including the accrued share of Hannah, survived to the appellant.

He referred to *Neathway v. Reed*, (a) *Doe v. Birkhead*, (b) *Edwards v. Alliston*. (c)

Mr. Willcock, for the respondents, the representatives of *Mrs. Farrar and Hannah Alcock*. — The words to be construed are not “with survivorship between them,” which, according to the authorities, might have restricted the gift over to children surviving the tenant for life, but are with “survivorship between mem-
* 485 bers * of the same family,” showing that the testator did not mean in this bequest any more than he did in the other similar bequests in his will to deprive the children of a child, if there were any, of the share intended for the parent, merely on account of the accident of the parent not having survived the tenant for life.

Mr. J. H. Palmer, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The only question upon which I shall give an opinion is that arising between the parties who are before the Court. I shall not say any thing as to any claim on the part of the children of *Mrs. Farrar*, who are not here. The question then to which I address myself is, to what period the words “with benefit of survivorship” ought to be considered as relating, and to how much. As there is a tenancy for life created in the fund, and as in the previous portion of the same paragraph the testator has alluded, in terms, to the necessity of the children surviving him — for he has used the words “who shall survive me” — I am of opinion that the words of survivorship refer to the time of the death of the survivor of the testator and the tenant for life, and that the testator meant to take away every portion of the gift from such legatees as should not survive the tenant for life. It is involved in what I have said that, in my opinion, the words “with benefit of survivorship” apply to the whole fund; not merely to the original shares, but also to what are commonly called “accruing shares.”

Thus much may be decided in the present state of the matter;

(a) 3 De G., M. & G. 18. (b) 4 Exch. 110. (c) 4 Russ. 78.

but I am not satisfied, having regard to the words in the parenthesis, whether the children of Mrs. * Farrar may be * 486 or not be able to make out a title to some share of the fund.

THE LORD JUSTICE TURNER.— The testator in the first place has given to his sister the income of the fund in question for her life, and then has given the capital thus: to “the children of my sister Mary Vickers (the issue of Ann Ion excepted), of my late sister Hannah Alcock, and of my said sister Frances Bates who shall survive me.” The testator therefore states in terms the primary objects of gift to be those who survive him. He then proceeds, “such children taking *per stirpes*,” by which he meant that each set of children was to take one-third of the fund. Then come the words “with benefit of survivorship amongst members of the same family.” These words must apply to persons who are objects of the original gift; that is, the children who survive the testator. There is therefore to be some survivorship between them. Then to what period must this survivorship be referred? I cannot see any thing to which it can be referred but death in the lifetime of the tenant for life.

It occurred to me as possible, though by no means probable, that something might be drawn from the context to show that the testator has used the word “survivorship” in an unusual sense, but on looking at the other dispositions of the will I cannot find any thing which could have that effect.

The question must be left open whether the children of Mrs. Farrar have not a title.

July 17.

* On this day, by arrangement, Mrs. Farrar's children * 487 having been served with the petition, the question was shortly submitted to the decision of the Court whether, as the words in a parenthesis in the bequest showed the testator to have meant the word children to include grandchildren, the children of Mrs. Farrar were not entitled.

Mr. Rolt appeared for them, and *Mr. J. H. Palmer*, for the petitioner.

Their Lordships held, that the children of Mrs. Farrar were entitled to the moiety which she would have taken if living.

THE NEWRY AND ENNISKILLEN RAILWAY COMPANY
v. THE ULSTER RAILWAY COMPANY.

1856. June 3, 4, 5. July 18. Before the LORDS JUSTICES.

Where a railway Act provided that the expenses of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the board of trade: *Held*, that the board of trade and commissioners of railways (who succeeded to the functions of the board) were not in the position of private arbitrators, but had a discretion which the Court could not control, and that a bill to set aside their award, on the ground of undue delegation of authority, and the admission of *ex parte* statements, could not be sustained.

THIS was an appeal from the dismissal by the Vice-Chancellor STUART of a bill which was filed by the appellants, the Newry and Enniskillen Railway Company, for the purpose of setting aside an award made by the commissioners of railways for the payment by the appellants of a sum of 3997*l.* 7*s.* as their proportion of the expense incurred in altering the gauge of the Ulster Railway, * 488 and in altering the rolling stock * of that company, and for an injunction to restrain the Ulster Railway Company from proceeding with an action at law to recover the sum awarded to be paid by the Newry and Enniskillen Railway Company.

The injunction prayed for by the bill had been granted upon the terms of judgment being given in the action, and of the money being paid into Court, and upon the cause coming on to be heard, Vice-Chancellor STUART made the decree under appeal, by which it was ordered that the Ulster Railway Company, notwithstanding the order made upon the application of the plaintiffs, should be at liberty to issue execution upon the judgment obtained by them in the action at law commenced by them against the plaintiffs; and it was ordered that the plaintiffs' bill should be dismissed out of this Court, with costs to be taxed; and it was ordered that the plaintiffs should pay to the defendants their costs when taxed, and that the plaintiffs and defendants, or any of them, should be at liberty to apply to the Court, as they might be advised touching the sum of 4545*l.* 0*s.* 4*d.* bank 3*l.* per cent annuities standing in the name of the accountant-general in trust in this cause, and the sum of 63*l.* 12*s.* 7*d.* cash in the bank to the credit of this cause

arisen from the 4123*l.* 7*s.* and interest which had arisen from the amount awarded, which had been paid into Court and invested.

The following statement of the facts of the case is taken from the judgment of Lord Justice TURNER : —

About the year 1836 an Act of Parliament was passed for making a railway from Belfast to Armagh through Portadown. That railway, called the Ulster Railway, was constructed from Belfast to Portadown, upon a gauge of 6 feet 2 inches. About the same time another * Act of Parliament was passed for con- * 489 structing another railway from Dublin to Drogheda. That railway was constructed throughout its whole length, and was made upon the gauge of 5 feet 3 inches. In the year 1847 the Ulster Railway Company not having been able to make their line from Belfast to Armagh, but having made the line from Belfast to Portadown only, applied to Parliament for power to make the line from Portadown to Armagh ; and at that time the views of Parliament upon the subject of the gauge, which was expedient to be adopted for railways in Ireland, had been altered, and Parliament was desirous that the railways in Ireland should be made uniformly upon a gauge of 5 feet 3 inches. It therefore became desirable to alter the gauge of the Ulster Railway from Belfast to Portadown from a width of 6 feet 2 inches to a width of 5 feet 9 inches. The Dublin and Drogheda Railway Company was also before Parliament at the same time, for the purpose of obtaining power to construct some branches. There was also before Parliament at that time a bill for the construction of a railway from Drogheda to Portadown, called "The Dublin and Belfast Junction Railway," the effect of that line being to open the whole line from Dublin to Drogheda, from Drogheda to Portadown, and from Portadown to Belfast. There were at the same time before Parliament two other railway companies, the Dundalk and Enniskillen, which was for making a railway from Dundalk to Enniskillen, which would cross or come in communication in some direct or indirect mode with the line from Dublin to Belfast ; and there was likewise another bill before Parliament, the bill of the present plaintiffs, being a bill for constructing from Newry to Enniskillen, which in the latter respect was in much the same position as the Dundalk and Enniskillen Railway.

* In that state of circumstances, it being deemed desirable * 490 that all these railways should be made upon the same gauge, a

clause was inserted in the Ulster Railway Act of the year 1847, in these terms: " And whereas the railway made under the powers of the said first recited Act " (that is the Act incorporating the Ulster Railway Company), " the Ulster railway was laid to a gauge of 6 feet 2 inches according to the recommendation in the report of the railway commissioners for Ireland, and the Dublin and Drogheda Railway Company have since laid their railway to a gauge of 5 feet 3 inches, and the same now proposed for general adoption in Ireland; and whereas it is expedient that the Ulster Railway Company should alter their gauge and working stock for the purpose of effecting an uninterrupted communication between the several lines of railway proposed to be in connection with the said Ulster railway, and it is proper that there should be an equitable adjustment as to the expenses of such alteration: be it therefore enacted, that the said Ulster Railway Company shall alter the gauge of 6 feet 2 inches, now in use on their railway between Belfast and Portadown, to the said gauge of 5 feet 3 inches, and shall adopt the last-mentioned gauge for the railway by this Act authorized to be made on their receiving payment of an equitable proportion of the expense of such alteration from the several companies whose interests shall be advanced by such alteration, such expense and the contribution to the same to be made by the said companies respectively, to be agreed upon between the parties, and in case of difference to be decided by reference to the Lords of the committee of privy council for trade, or to such person as they shall nominate for the purpose: provided that it shall be lawful for the Lords of the said committee, or for such person nominated by them, to decide whether a proportion of the expense of altering

* 491 * both the gauge and stock of the said railway, or of altering the stock only, shall be defrayed by the other companies, and also in what proportions and by what companies such expense shall be defrayed."

Similar provisions were introduced into the Dublin and Drogheda Act, the Dublin and Belfast Act, the Dundalk and Enniskillen Act, and a like provision was introduced into the Newry and Enniskillen Act, which contained nearly the same recitals as the others, and recited that the Ulster Railway Company had agreed " to alter their present gauge to the gauge so proposed to be adopted on the terms of their being paid an equitable portion of the expense thereof, such expense and the proportions thereof to be

borne by the several companies whose interests will be advanced by such alteration." It then proceeded to enact as follows: "That the Newry and Enniskillen Company shall pay to the Ulster Company such proportion of the said contribution to the expense of the said alterations as shall be agreed upon between the parties, or in case of difference as shall be awarded by the Lords of the committee of privy council for trade, or by any person nominated by them for the purpose, and that such payment shall be made to the said Ulster Railway Company within three months after the production of the said award to the said company by this Act incorporated."

Then there was the same proviso as in the Ulster Act, that the Lords of the committee, or the person nominated by them, should "decide whether a proportion of the expense of altering both the gauge and stock of the said Ulster railway, or of altering the stock only, shall be defrayed by the other companies, and also in what proportion and by what companies such expense shall be defrayed."

* There was, however, some difference in point of lan- * 492
guage in these Acts, some of them saying that the board of trade were to decide what proportion, "if any," was to be paid, others that the board of trade were to decide "what" proportion.

These Acts of Parliament being passed, the Ulster Railway Company proceeded to alter the gauge of their line between Belfast and Portadown, and to lay down the line at a gauge of 5 feet 3 inches, and also to alter their rolling stock. Having completed those alterations, they in the year 1849 applied to the several companies to pay their proportion of the expense which had been incurred in the alteration, and upon that occasion application was made to the Newry and Enniskillen Company, and that company referred the matter to their solicitors, and came to a resolution upon the subject on the 28th of June, 1849, which was in these terms:—

"Read letter of the 5th of March last from the secretary of the Ulster Railway Company, and Mr. Leech's letter to the secretary of this company of the 7th May last, on the subject of a contribution in respect of the expenses of the alteration of their gauge:—Resolved, that in the circumstances of this company it is not considered that they are at all liable for any contribution to the Ulster Railway Company."

On the 12th of July, 1849, the Ulster Company having in the mean time applied to the board of trade, not being able to bring the other companies to terms, the directors of the Newry and Enniskillen Company met again, and they passed on the 12th of July, 1849, this resolution:—

“ Read letter from the secretary of the Ulster Railway
 * 493 * Company of the 5th instant, in reference to the expense attendant on the alteration of the gauge of that railway, and communication from the railway commissioners on the same subject: Referred to the solicitors.”

The commissioners of railways had in the mean time been substituted for the board of trade under the provisions of the Act of 9 & 10 Vict. c. 105, so that this application was made to the commissioners of railways and not to the board of trade. The Newry and Enniskillen Railway Company returned no answer to the commissioners of railways, and from that time, according to the statement in the bill, no communication took place between the Newry and Enniskillen Railway Company and the commissioners until the month of November, 1850. But there was a letter written on the 7th of January, 1850, by the commissioners of railways to the Newry and Enniskillen Railway Company, and some question was raised upon the argument whether that letter was or was not, or ought or ought not, to be taken to have been received by the Newry and Enniskillen Railway Company. The Court, however, was satisfied that upon the evidence it was bound to consider that the letter of January, 1850, from the railway commissioners to the Newry and Enniskillen Company was received by them. That letter was in these terms:—

“ Whitehall, January 7th, 1850.

“ Sir,— I have been directed by the commissioners of railways to request you to furnish them without delay with any observations the directors of the Dublin and Belfast Junction (Newry and Enniskillen) Railway Company may have to make upon the claims of the Ulster Railway Company for compensation for change of gauge, in reference to which a statement was forwarded to
 * 494 you from this office on the 11th of July last. * I am at the same time to inform you that if any further delay takes place in supplying the information required, the commissioners will feel it their duty to decide the question without any statement

from the Dubin and Belfast Junction (Newry and Enniskillen) Railway Company."

In the month of November, 1849, the Newry and Enniskillen Railway Company had been applied to by one of the other companies to agree to bear a portion of the expense of nominating a third person to investigate the claim which had been made by the Ulster Railway Company, with a view to the reduction of that claim. Upon that occasion the Newry and Enniskillen Railway Company, in conformity with the resolution which they had passed considering that they had nothing to do with the matter, determined that they would not contribute. The plaintiffs, by their secretary, wrote the following answer:—

"November 5th, 1849.

"To the secretary of the Belfast Railway Company.

"Sir,—The directors of this company received a few days ago from Mr. Bryden your communication of the 11th October, touching the expense of an examination by Sir John Macneill of the accounts of the Ulster Company for the alteration of their gauge, and have had the same under their consideration. In reply, I am directed to acquaint you that the directors would have every confidence in the decision of Sir John Macneill, and would willingly contribute their proportion of the expense, but this board have always contended that until the construction of their own line is completed no responsibility attaches to this company in respect of altering the gauge of the Ulster line, and under these circumstances they are at present unable to give any directions in the matter referred to."

* There the matter, so far as the Newry and Enniskillen * 495
Railway Company were concerned, rested until the month of November, 1850; but in the month of November, 1850, the railway commissioners addressed the Newry and Enniskillen Railway Company again in these terms, by a letter dated the 19th November, 1850: "Sir,—I am directed by the commissioners of railways to inform you that they have now considered the report of their officers, and are prepared finally to dispose of the claims of the Ulster Railway Company against the different railways who are bound to pay such proportions of the expense of altering the

gauge of that railway as may be awarded by the commissioners. I am also to inform you that previous to so doing they are willing to receive any further statement which either of the parties may have to offer, either as to the sum to be apportioned amongst the several companies, which the commissioners are at present disposed to think should be, — for alteration of permanent way and works 7236*l.* 12*s.* 8*d.*, rolling stock 8327*l.* 4*s.* 11*d.*, total 15,563*l.* 17*s.* 7*d.*, or as to the proportion which each company is to contribute, provided such statements are sent to the commissioners before the 1st December next, when they will proceed to make the award."

The commissioners in the mean time had been in communication with the several other companies, except the Dundalk and Enniskillen, and they had in the month of August, 1850, appointed Captain Wynne to go over to Ireland for the purpose of investigating the justice of the claim and the amount which ought to be allowed for the expenditure by the Ulster Railway Company. .

It appeared that Captain Wynne had made a report to them, and that the Newry and Enniskillen Railway Company had not been summoned for the purpose of appearing before Captain * 496, Wynne upon that occasion, but * that some witnesses had been examined before Captain Wynne, and that there had been some communications between the other railway companies and the commissioners. It did not appear that the communications which were had between the commissioners and the other companies, or what had passed with Captain Wynne, were or was at all known to the Newry and Enniskillen Railway Company.

Under these circumstances the Newry and Enniskillen Railway Company, towards the end of November, presented a memorial to the commissioners of railways stating their Acts of Parliament and the alterations which had taken place in the plan of their railway, and that in the first instance they had intended to make the whole line from Newry to Enniskillen, but had failed in obtaining funds to do so, that they then got another Act of Parliament by which the length of the line was reduced, and that by the last Act of Parliament what was proposed was to make the railway merely from Newry to a place called "Goragh Wood," which was on the line of the Dublin and Belfast Junction Railway. After referring to these circumstances, and stating that the length of the line when made would be only four miles, the memorial concluded thus: "From the foregoing statement the directors of this com-

pany respectfully submit to your honourable board that, should this company succeed in obtaining the necessary powers to extend their line from their present terminus in Edward Street to the landing-quay of the Newry Navigation, then the extreme length of their line will be four miles, and that this company is not liable to contribute to the expense of altering the gauge of the Ulster Railway in any greater proportion than these four miles may bear to the whole length of the lines of the several companies liable to contribute to the same; and further, that the question of contribution as * affects this company should be postponed until * 497 the intended four miles of railway shall have been completed and open for traffic."

The commissioners having had that memorial under their consideration, nevertheless proceeded to make their award, whereby they awarded a sum of 3997*l.* 7*s.* to be the proportion of the expense incurred by the Ulster Company which ought to be paid by the Newry and Enniskillen Railway Company.

An action being brought on the award, the bill in the present suit was filed for an injunction to restrain the action and to have the award set aside.

The case made by the bill was nearly if not entirely summed up in one single passage, which was in these words: "That the said commissioners of railways received the said report of the said Captain Wynne to whom they delegated their authority to examine witnesses and hear the said several railway companies other than the plaintiffs respecting the matters referred to them the said railway commissioners as aforesaid, and they also received from the several railway companies other than the plaintiffs the several letters and written statements hereinbefore set forth or referred to, and divers other communications upon the subject-matters of the said reference, and they also examined among other persons the said Sir John Macneill, the engineer of the said Dublin and Belfast Junction Railway Company, and who was employed by the said last-named company to protect their interests in the matter of the said claim to contribution on the part of the said Ulster Railway Company and to give evidence on behalf of the said Dublin and Belfast Junction Railway Company on the question of compensation, and the said commissioners * received * 498 from him estimates and reports, upon which the said commissioners acted, without the knowledge of either of the plaintiffs

or any of the said other companies interested, except the said Dublin and Belfast Junction Railway Company, and the said commissioners of railways founded their said award upon the aforesaid report of the said Captain Wynne and the said several letters, written statements and communications, and the said private examination of the said Sir John Macneill, and the said estimates and reports delivered by him to the said commissioners, and none of the said several particulars were communicated to the plaintiffs, nor had the plaintiffs any opportunity of being heard in opposition thereto or in explanation thereof or of any of them, before the said award was made."

Mr. Daniel, Mr. Speed, and Mr. Dowdeswell in support of the appeal. — The jurisdiction of the commissioners of railways, like that of any other public body acting in the exercise of a trust reposed in them by the legislature, must be subject to the control of this Court. It is clear upon the evidence that the commissioners unduly delegated their authority, and, moreover, that the plaintiffs have never had an opportunity of being heard by the commissioners, but that evidence was received by them without the plaintiffs' knowledge and without the plaintiffs having been afforded any opportunity of meeting it.

They referred to *Greenhill v. Church*, (a) *Lonsdale v. Little-dale*, (b) *Chicot v. Lequesne*, (c) *Nichols v. Chalie*, (d) * 499 *Gwinett v. Bannister*, (e) *Reynell v. Luscombe*, (g) * *Auriol v. Smith*, (h) *Goodman v. Sayers*, (i) *Davis v. Getty*, (k) *Dawson v. Sadler*, (l) *Nichols v. Roe*, (m) *Heming v. Swinerton*, (n) *Russell on Arbitration*, (o) *Walker v. Frobisher*, (p) *Fetherstone v. Cooper*, (q) *Harvey v. Shelton*, (r) *Dobson v. Groves*, (s) *In re Plews and Middleton*, (t) *In re Hawley and the*

(a) 3 Rep. in Ch. 88.

(h) *Ib.* 121.

(b) 2 Ves. Jr. 451.

(i) 2 Jac. & W. 249.

(c) 2 Ves. 315.

(k) 1 Sim. & St. 411.

(d) 14 Ves. 265.

(l) *Ib.* 537.

(e) *Ib.* 450.

(m) 3 Myl. & K. 431.

(g) T. & R. 135 n.

(n) 1 C. P. Coop. temp. Cottenham, 386; 14 Sim. 588; 2 Ph. 79; 5 Hare, 350.

(o) Page 658 (2d ed.).

(r) 7 Beav. 455.

(p) 6 Ves. 70.

(s) 6 Q. B. 637.

(q) 9 Ves. 68.

(t) *Ib.* 845.

[386]

North Staffordshire Railway Company, (a) Peterson v. Ayre, (b) Armitage v. Walker, (c) Veale v. Warner, (d) Braddick v. Thompson, (e) Dresser v. Stansfield, (g) Armitage v. Coates, (h) Wills v. M' Cormick, (i) Grazebrook v. Davis. (k)

Mr. Bacon and Mr. T. Stevens, for the Ulster Railway Company. — This is not the ordinary case of arbitration. The Act of Parliament constitutes the commissioners judges and places them under no obligation to call or examine parties. But the plaintiffs have no just cause for complaint. They might have appeared if they had thought fit, and if they did not come forward it was their own fault. They were advised by their solicitors that they were not liable to contribute to the expense, or at all events were not so until the line was completed. They thought fit to act on this advice and did not attend, but they knew what was going on. The commissioners under these circumstances * have * 500 only acted as any other arbitrators would have been justified in doing. But whether they did so or not is a matter for the consideration of Parliament and not of this Court.

They referred to *Hopcraft v. Hickman, (l) Drew v. Drew, (m) Waller v. King. (n)*

Mr. W. Bovill, for the Dublin and Drogheda Railway Company.

Mr. Bagshawe, and Mr. Bagshawe, Jr., for the Dublin and Belfast Railway Company.

Mr. Daniel, in reply. — As to the question of the jurisdiction of the Court. The commissioners are either a tribunal subject to law or not. To make out that they are beyond the control of all law, clear words must be found for that purpose in the Act, and none have been pointed out to that effect. If they are subject to the law, they must be so in the ordinary way.

(a) 2 De G. & Sm. 33.

(b) 15 C. B. 724.

(c) 2 K. & J. 211.

(d) 1 Saund. 327.

(e) 8 East, 344.

(g) 14 M. & W. 822.

(h) 4 Exch. 641.

(i) 2 Wils. 148.

(k) 5 B. & C. 534.

(l) 2 Sim. & St. 180.

(m) 2 Macq. 1.

(n) 9 Mod. 63.

He referred to *The Queen v. Grant.* (a)

Judgment reserved.

July 18.

THE LORD JUSTICE TURNER. — [After stating the facts and reading the paragraph from the bill which has been already set out, his Lordship proceeded thus:] That passage contains in truth the whole sum and substance of this bill.

* 501 * In this state of circumstances the first question to be considered is, what was the true position of the commissioners of railways? They stand in the place of the board of trade, and whatever were the duties and functions of the board of trade in this matter have devolved upon the commissioners of railways. We have to consider, therefore, what, according to the true intent and meaning of these Acts of Parliament, those duties and functions were. The bill throughout treats the board of trade as having stood in the position of mere arbitrators. The whole case upon the bill rests upon this basis, — that the board of trade were arbitrators, and that they neglected and infringed upon the rules and duties which it is incumbent on arbitrators to observe. The argument proceeded upon the same footing; for it was rested on the original jurisdiction of this Court over awards, and the continuance of that jurisdiction where the statute has not interfered with it.

Was then the board of trade intended by these Acts to be placed in the position of mere arbitrators, subject to and bound by all the duties and obligations which attach upon persons standing in that position? I have not been able to satisfy my mind that it was. The board of trade is a public board, one of the departments of the government of the country, and I cannot think that it was intended by these Acts that it should be placed in the position of a mere private arbitrator. Had it been so intended, would it not have been provided by what member of the board the duty should be discharged? Was it to be discharged by the president or vice-president, or both, or by one or other of them at different times? Look again at the language of the Act. It is that the amount to be paid, and the contributions to the same, are to be decided by reference to the board of trade. Does this mean more than

(a) 14 Q. B. 43.

that in case the * parties do not agree the decision is to be * 502 left to the board of trade, and left to them without restriction as a matter to be governed by their discretion and not by any legal rules or principles ? Where are the legal rules and principles on which these questions were to be decided ? The board of trade, it is to be remembered, at this time had much if not all of the railway business of the country under its control and management, and it might well be thought by Parliament that it would be the best tribunal to dispose of such questions as these, and surely the nature of these questions confirms that view. What is to be paid is an equitable proportion of the expense of the alterations, and it is to be paid by the parties whose interests should be advanced by the alterations. How could it be determined on any legal principles what the equitable proportion ought to be, or to what extent the interests of the different companies would be advanced by the alteration ?

Again, does not the proviso fortify this view ? The proviso is " that it shall be lawful for the Lords of the said committee, or for such person nominated by them, to decide whether a proportion of the expense of altering both the gauge and stock of the said railway, or of altering the stock only, shall be defrayed by the other companies, and also in what proportions and by what companies such expense shall be defrayed." The commissioners therefore are to decide, and by what principles is their decision to be guided ? And again, in some of the Acts it says they are to pay such proportion, " if any." By what legal rule or principle is that to be decided ?

Looking therefore to the provisions of these Acts of Parliament and to the position of the parties, I cannot but think that it was not the intention of these Acts to place the board of trade in the position of mere arbitrators, governed by legal rules and obligations, and that * the railway commissioners therefore * 503 did not stand in that position ; that at all events discretion was intended to be given and exercised.

It was argued on this part of the case, that if the board of trade or the railway commissioners had appointed a nominee to decide these questions, which by the Acts they were empowered to do, their nominee would have been a mere arbitrator, bound by the legal obligations which attach upon arbitrators. But if the legislature intended to place the board of trade in the position of judges

to settle these differences, with power to exercise discretion upon them, I do not see why it may not equally well have intended to give the board the power of appointing a person who should decide them with the like exercise of discretion,—a power which they were well able to exercise. Nor am I at all satisfied that if the duties of an arbitrator would have attached upon the nominee of the board, they would therefore attach upon the board itself.

If, then, the commissioners did not stand in the mere position of arbitrators,—if they had a discretion as to the amount to be paid and the contributions to be made,—is this a case for the interference of this Court? I apprehend not. The commissioners may be amenable to Parliament for not having discharged their duty, but I see no ground upon which this Court can review their acts. Public officers may be kept by this Court within the limits of their authority, but if their authority is indefinite, how is this Court to define the limits?

Some cases were referred to on this subject,—the cases under the Municipal Corporation Act, the cases against the Lords of the treasury on grants from the Crown, and the cases on conventions with foreign governments. * But in all those cases there was some trust or appropriation existing or to arise, or some defined right to be worked out and acted on, and the jurisdiction of this Court attached upon that trust or right. Here, however, if I am right in the view which I have taken of these cases, there is no right independent of the decision of the commissioners under the Acts.

These considerations are, I think, alone sufficient to dispose of this case, and it is unnecessary therefore to give any opinion upon the other points which were argued before us. I do not therefore enter fully into those points, but in abstaining from doing so I desire not to be understood as intimating any opinion in favour of this bill even upon those other points. I much doubt whether if these commissioners were intended to be arbitrators merely they could be held bound to pursue the strict practice which mere arbitrators are bound to adopt. I think it may well be held, that parties who have agreed or are bound by Act of Parliament to abide by the decision of a public board, must abide by the course of practice which that board is in the habit of adopting; and there is no allegation in this bill that what has been done in the prosecution of this inquiry is contrary to that course of practice.

I should hesitate long, however, before I should hold that any arbitrator, either public or private, could be justified in acting upon evidence taken behind the back of the party to be affected by it, or that any award founded upon evidence so taken could be maintained, in the absence of any consideration to the contrary arising upon the conduct of the party so affected. But in this case I exceedingly doubt whether there has not been such conduct on the part of these plaintiffs as to defeat any right which they might otherwise have had to impeach this award. I *doubt *505 whether these plaintiffs did not throughout intend to leave the question as to the amount to be paid to be contested by those who in that respect had a common interest with them. I doubt it the more from their conduct in November, 1849; from an application made to them by the Dublin and Belfast Company, and from the fact that their memorial of November, 1850, does not, as I read it, question or dispute the gross amount to be paid, but refers only to the proportions in which the amount is to be paid; and upon that point, if the course and practice of the commissioners was to proceed by memorial (and it is not alleged to have been otherwise), the plaintiffs have had the full benefit of their own statement of their case. For of course it cannot be assumed that the commissioners did not consider the memorial.

I say nothing as to the merits of the award, for with that point, I apprehend, we have nothing to do.

Upon the whole, my opinion is that this appeal must be dismissed; but the case is so new and attended with so much difficulty that I think it should be dismissed without costs.

THE LORD JUSTICE KNIGHT BRUCE. — Both my learned brother and myself having considered this case attentively, he has been able to arrive at a conclusion upon it, but hitherto I confess that I have not. Finding, however, that he had formed an opinion necessarily decisive of our judgment here, an opinion, namely, that the appeal ought to be dismissed without costs, I wished and he agreed that the parties to it should not longer be delayed on my account. Accordingly, without concurrence as without dissent on my part, the appeal stands dismissed.

1856. May 28, 30, 31. June 2, 3, 27. Before the LORDS JUSTICES.

A testator, after the Apportionment Act, 4 Will. 4, c. 22, devised freehold lands to two trustees, their heirs and assigns, upon trust to pay thereout to his widow an annuity for her life, and after her decease, then upon trust for A. and B., their heirs and assigns, as tenants in common: *Held*, that the legal estate in the trustees was not restricted to the life of the widow.¹

One of two executors and trustees who had in their possession title-deeds of an estate of which their testator and a debtor to his estate had been tenants in common, requested the debtor to allow the executor to retain the title-deeds as a security for the debt. The debtor wrote an answer, saying, that the executor might retain the deeds till the debtor got the whole of his affairs settled with the executors, and that he was endeavouring to arrange so as to buy or sell the property: *Held*, a good equitable mortgage for the debt.²

A father-in-law who paid a mortgage debt secured on his son-in-law's property and took a receipt from the mortgagee, in which the mortgagee agreed to reconvey the property when required: *Held*, not to have shown an intention to exonerate the property.

THIS was an appeal from the decision of Vice-Chancellor STUART in a foreclosure suit holding the plaintiffs entitled to the benefit of a charge claimed by the bill in priority to Edward Henderson Potts, one of the defendants, under the following circumstances:—

In 1826 John Chambers and his sister Mrs. Potts were entitled as tenants in common in fee to hereditaments in Newgate Street, Newcastle-upon-Tyne, in the pleadings and correspondence called the Whitecross property.

By indentures of the 25th and 26th of September, 1826, Mrs. Potts mortgaged her share to William Hogg for 600*l*.

Mrs. Potts died on the 20th of January, 1830, leaving John Potts, one of the defendants, her heir-at-law, and on the 6th of September, 1831, John Chambers paid to William Hogg the principal sum of 600*l*., together with the interest then due on the mortgage; and one question of fact in the suit was whether he did so by way of exonerating the estate from the mortgage for the benefit of his son-in-law John Potts, or whether he intended to

¹ See *Lewin Trusts* (5th Eng. ed.), 177–180; *Perry Trusts*, § 312 *et seq.* and cases in notes; *Hill Trustees* (3d Am. ed.), 354, [239] *et seq.*

² See 4 Kent (11th ed.), 150, 151.

keep the mortgage alive, no transfer of the security having been taken in Mr. Chambers's lifetime, and he having * taken from Mr. Hogg a receipt containing an agreement * 507 to "reconvey" the share when required.

John Chambers by his will, dated the 3d of August, 1837, appointed William Lee and Robert Thompson his executors, and devised all his freehold messuages, tanyard, and hereditaments situate in Newgate Street, Newcastle-upon-Tyne, unto William Lee and Robert Thompson, their heirs and assigns, upon trust to pay thereout to the testator's wife Ursula Chambers an annuity of 50*l.* for her life, and after her decease then upon trust for William Lee and the defendant John Potts, their heirs and assigns, as tenants in common; and the testator gave all his residue of his estate and effects, after payment of his legacies and debts, unto William Lee, his heirs, executors, administrators, and assigns.

Mr. Chambers died on the 18th of January, 1839, and on the 25th of May, 1839, his will was proved by William Lee and Robert Thompson.

Ursula Chambers died on the 12th of September, 1839.

William Lee died on the 2d of November, 1841, having by his will, dated the 16th of October, 1841, bequeathed the residue of his personal estate and effects unto his widow Jane Lee and the plaintiff John Fenwick, their executors, administrators, and assigns upon trusts therein mentioned; and he appointed Jane Lee and John Fenwick his executrix and executor. James Wilkin, the other plaintiff, was subsequently appointed under a power in the will a new trustee.

William Lee was at his decease a creditor of John Potts for two sums of 900*l.* and 166*l.* 12*s.* 10*d.*

* After the death of William Lee, John Fenwick re- * 508 quested John Potts to give the trustees of the will of William Lee a mortgage for the debts of 900*l.* and 166*l.* 12*s.* 10½*d.*, but John Potts refused to do so.

At length on the 5th of June, 1847, the plaintiff John Fenwick wrote the following letter to John Potts:—

“ Newcastle-upon-Tyne, 5th June, 1847.

“ Dear Sir, — I fully expected to have had the pleasure of seeing you to-day, as the parties are very urgent. Do write a note to me and say that I may retain the deeds of the Whitecross prop-

erty as a security for Mr. Henderson's note and the shop bill until the mortgage-deed is executed, as this may satisfy parties in the mean time.

"I am, dear sir, yours truly,
"JOHN FENWICK."

"Captain Potts, Benton Park."

John Potts answered as follows:—

"Benton Park, 7th June, 1857.

"Dear Sir,—You may retain the title-deeds of my property at the Whitecross, in Newcastle-upon-Tyne, in your hands until I get the whole of my affairs settled with the late Mr. Lee's executors.

"Yours truly,
"JOHN POTTS.

"P. S.—I am endeavouring to arrange money matters so as either to buy or sell the property. J. P."

Before and at the date of these letters the plaintiff John Fenwick had and still retained in his possession all the title-deeds of the entirety of the Whitecross estate. These deeds had * 509 been in the possession of John * Chambers up to and at the time of his decease, and had then come into the possession of William Lee. At the death of William Lee they came into the possession of John Fenwick as one of the executors of William Lee's will.

By an indenture dated the 3d of January, 1849, and made between William Hogg of the first part, Robert Thompson of the second part, and the plaintiffs James Wilkin and John Fenwick of the third part, William Hogg assigned to the plaintiffs James Wilkin and John Fenwick, their executors, administrators, and assigns, the said mortgage debt of 600*l.* upon the trusts of the will of William Lee, or such of them as were then subsisting and capable of taking effect. And he also conveyed the undivided moiety and other the hereditaments comprised in the mortgage unto James Wilkin and John Fenwick, their heirs and assigns, subject to such equity of redemption on payment of 600*l.* and interest, as the hereditaments were then liable to under and by virtue of the mortgage.

The bill charged that under the circumstances aforesaid the plaintiffs were entitled to the benefit of Mr. Hogg's mortgage of the 26th of September, 1826, as the first charge on John Potts's descended moiety of the Whitecross estate, and were also entitled to an equitable mortgage, not only on this moiety, but on the fourth part devised to John Potts by Mr. Chambers, for securing the sums of 900*l.* and 166*l.* 12*s.* 10½*d.* and interest under the letters of the 5th and 7th of June, 1847. But the bill charged that Edward Henderson Potts, one of the defendants, claimed an interest in the mortgaged premises, and had lately served a notice on the tenants, in which he alleged that by an indenture dated the 28th of December, 1850, and made between John Potts of the one part and Edward Henderson Potts of the other * part, * 510 John Potts had mortgaged his three-fourth parts of the hereditaments to Edward Henderson Potts for securing the sums of money therein mentioned.

With reference to this claim the bill charged that before the alleged mortgage to Edward Henderson Potts was made, or the consideration for the same was paid or advanced, Edward Henderson Potts, or the professional person or persons employed by him in or about or with respect to the same, had notice of or had reason to know, believe, or suspect the existence of the securities to which the plaintiffs were then or claimed to be entitled as trustees of the will of William Lee.

The prayer was for an account of what was due for principal and interest upon the mortgages in respect of the sums of 900*l.*, 600*l.*, and 166*l.* 12*s.* 10½*d.*, and that the defendants John Potts and Edward Henderson Potts might be decreed, on a short day to be appointed for that purpose, to pay to the plaintiffs what should be found due, with their costs of the suit, and that in default thereof the defendants might be foreclosed.

Edward Henderson Potts by his answer denied notice, and claimed as mortgagee for value and as having the legal estate in one-fourth part of the estate to be entitled at all events as regarded that fourth part in priority to the plaintiffs.

By the decree under appeal (which was made on the 14th of January, 1854) it was declared as follows: "That the plaintiffs as equitable mortgagees under the letter of the 7th day of June, 1847, are entitled to priority over the defendant Edward Henderson Potts in respect of the one-fourth of the estate in the plead-

ings mentioned, the legal estate in which one-fourth is
 * 511 vested * in the said defendant Edward Henderson Potts by
 his mortgage of the 28th day of December, 1850, in the
 pleadings mentioned." The decree directed taxation of the plain-
 tiffs' costs, and that an account should be taken of what was due
 to the plaintiffs for principal and interest on the mortgage for
 600*l*. And after directing the usual accounts against the plaintiffs
 as mortgagees in possession, it directed that what should be com-
 ing on this account should be deducted from what should be found
 due to the plaintiffs for such principal, interest, and costs, and
 that, upon the defendant Edward Henderson Potts paying to the
 plaintiffs what, upon the balance of the accounts, should be cer-
 tified to be due to the plaintiffs within six months, the plaintiffs
 should convey to the defendant Edward Henderson Potts the
 three-fourth undivided shares of the estate called the Whitecross
 property, with the usual directions ; but in default of such pay-
 ment by Edward Henderson Potts it was ordered that he should be
 foreclosed ; and in case of such foreclosure, it was ordered that he
 should convey to the plaintiffs the legal estate as to the one-fourth
 of the property which was vested in him by his mortgage of the
 28th day of December, 1850 (free from all incumbrances), to be
 held by the plaintiffs as mortgagees under the letter of the 7th of
 June, 1847, discharged from Edward Henderson Potts's mortgage.
 And it was ordered that the defendant Edward Henderson Potts,
 he by his counsel consenting, should covenant with the plaintiffs
 for production of his mortgage security to the plaintiffs. The
 decree then proceeded to give similar directions as to the foreclo-
 sure of John Potts.

Mr. Malins and *Mr. Smythe*, for the plaintiffs. — As to the
 descended moiety there can be no question. The legal
 * 512 estate in this is vested in the plaintiffs, whose * equities
 are also prior to those of Edward Henderson Potts. With
 respect to the devised one-fourth, although we do not complain of
 the decree, we submit that it erroneously assumes the legal estate
 to be in the defendant Edward Henderson Potts. The legal estate
 was in fact outstanding in the trustees of *Mr. Chambers's* will. By
 his will the property is devised to the trustees and their heirs ; and
 there is nothing to cut down this estate, the whole of which might
 be required for the purpose of raising the annuity. The Court

has refused to abridge the trustees' estate in such cases. *Colemore v. Tyndall*. (a) Even if the legal estate in this one-fourth had passed by Mr. Chambers's will to John Potts, and so had become vested in Edward Henderson Potts, actual notice of the plaintiffs' security is shown to have reached Edward Henderson Potts or his solicitors, who acted both for the father and the son on the occasion of the mortgage to the latter.

They referred to *Doe v. Simpson*, (b) *Robinson v. Grey*, (c) *Cooke v. Blake*, (d) *Ware v. Lord Egmont*, (e) *Finch v. Shaw*, (g) *Brotherton v. Hill*, (h) *Jennings v. Moore*, (i) *Le Neve v. Le Neve*, (k) *Lowther v. Carlton*, (l) *Mountford v. Scott*, (m) *Toulmin v. Steere*, (n) *Hargreaves v. Rothwell*, (o) *Tylee v. Webb*, (p) *Winter v. Lord Anson*, (q) *Fuller v. Bennett*, (r) *Sugden's Vendors and Purchasers*, (s) *Fearne's Contingent Remainders*. (t)

* *Mr. Elmsley and Mr. Shebbeare*, for the defendants * 518 John Potts and Edward Henderson Potts. — There are three debts in respect of which the plaintiffs claim priority, each subject to different considerations. As to the debt of 600*l.*, no intention is shown on the part of Chambers to keep that debt alive, and the evidence on the whole shows that the payment by Chambers was intended to exonerate John Potts's moiety from the debt in favour of John Potts. As to the other two debts, the evidence does not show sufficient consideration for the defendant John Potts taking them upon himself; and if it did, the letters do not amount to an equitable charge. At all events, as to the devised one-fourth, Edward Henderson Potts has the legal estate. For in a will the legal estate in the trustees will be restricted to the purposes required by the will; and here the only purpose for which the legal estate was required to be in the trustees was to secure payment of the annuity during the life of the widow. On her death therefore

(a) 2 Y. & J. 604.

(b) 5 East, 162.

(c) 9 East, 1.

(d) 1 Exch. 220.

(e) 4 De G., M. & G. 460.

(g) 19 Beav. 500; 5 H. L. Cas. 905.

(h) 2 Vern. 574.

(i) 2 Vern. 609.

(k) 3 Atk. 646.

(l) 2 Atk. 242.

(m) T. & R. 274.

(n) 3 Mer. 210.

(o) 1 Keen, 154.

(p) 6 Beav. 552.

(q) 3 Russ. 488.

(r) 2 Hare, 394, 402.

(s) Page 456 (11th ed.).

(t) Pages 53, 54 (8th ed.).

the legal estate vested in John Potts; and Edward Henderson Potts consequently took the legal estate under the mortgage, and took it without notice of the plaintiffs' claims.

They referred to *Curtis v. Price*, (a) *Beaumont v. Marquis of Salisbury*, (b) *Doe v. Nicholls*, (c) *Penny v. Watts*, (d) *Barnhart v. Greenshields*, (e) *Chapman v. Chapman*, (g) *Doe v. Simpson*, (h) *Shapland v. Smith*. (i)

Mr. Smythe, in reply.

Judgment reserved.

June 27.

* 514 * THE LORD JUSTICE KNIGHT BRUCE. — In this case had the appeal been earlier it would have surprised me less than it does, having been presented not before the year 1856. It has been argued with zeal and ability, but the discussion has failed to convince me that the decree of which complaint is made, and which was pronounced so far back as January, 1854, does injustice to either appellant. For although the first paragraph of its ordering part seems to me susceptible of amendment, by substituting for the words "in respect of the one-fourth of the estate in the pleadings mentioned, the legal estate in which one-fourth is vested in the said defendant Edward Henderson Potts by his mortgage," the words "as mortgagee under or by virtue of the mortgage;" and though I think that this or some such alteration in the paragraph had better be made, yet in its present state it does no harm, nor does a subsequent reference in the decree to a "legal estate" as being in the appellant Edward Henderson Potts, though the decree should in this respect also be, as I consider, altered.

The appellants have contended that the payment to Mr. Hogg of the 600*l.* was made as a gift to Mr. John Potts by his uncle Mr. Chambers, by whom it seems clear, and I am satisfied that the payment was in fact made. But neither the whole nor any

(a) 12 Ves. 101.

(b) 19 Beav. 198; see also *Lewis v. Rees*, 3 K. & J. 132.

(c) 1 Barn. & Cr. 342.

(g) 13 Beav. 308.

(d) 1 Mac. & Gor. 150.

(h) 5 East, 162.

(e) 9 E. F. Moore, 18.

(i) 1 Bro. C. C. 74.

part of the evidence convinces me that a gift of the money by Mr. Chambers was made or intended. I think that originally he meant to become, and that he did in equity become, a mortgage creditor for the 600*l.* in Mr. Hogg's place, and that the legal and formal transfer by the latter made in the year 1849 of his mortgage was neither an irregular nor an inequitable act. It is true that at one time I doubted whether the words "all those my freehold *messuages, tanyard, and hereditaments, with * 515 their and every of their appurtenances, situate in Newgate Street, in Newcastle-upon-Tyne aforesaid," were not sufficient to include the benefit of the 600*l.* mortgage, and therefore whether Mr. John Potts did not under the will take half of that benefit; but this doubt was, upon consideration, removed from my mind, and I am satisfied that the words just quoted comprised the testator's original moiety of those tenements, and no more. The decree, therefore, I repeat, is in my opinion right as to the 600*l.* mortgage.

Then with regard to the letters of the 5th and 7th of June, 1847, it appears to me that by the latter the appellant John Potts intended to promise, and did promise, to make his three-fourths of those tenements a security for the debts of 900*l.* and 166*l.* 12*s.* 10½*d.*, and that the letter of the 7th of June accordingly created an equitable mortgage upon those three-fourths for both sums.

Next as concerning the claim of the defendant Edward Henderson Potts to priority, if not as to the three-fourths, at least as to one of the three-fourths, over the plaintiffs, I think it not necessary to give an opinion upon the question whether the appellant Edward Henderson Potts took that mortgage with any other notice, actual or constructive, of the plaintiffs' rights or claims than such notice as the latter appellant had through his solicitors.¹ My reasons are these. The appellant John Potts, in my opinion, did not take any legal estate or legal interest as a devisee under John Chambers's will in any portion of the three-fourths, and in my judgment, therefore, if for no other reason, Mr. Edward Henderson Potts certainly was and is affected and bound as to the three-fourths by the letter of the 7th of June, 1847, preceding as it did not only his mortgage but also the *agreement for it, * 516

¹ See notes to Penny v. Watts, 1 Mac. & G. 150; Sugden V. & P. (14th Eng. ed.) 757; Atterbury v. Wallis, *ante*, 454 and note (1).

a conclusion at which it is possible that I should have arrived, had my view of Mr. Chambers's will agreed with that assumed by the decree.

I say "assumed by the decree." because the Vice-Chancellor seems to have had the point scarcely, if at all, argued before him. I collect that upon it there was little or no contest in his Court. But the trust for the benefit of the wife of Mr. Chambers to the extent of 50*l.* per annum for her life was one which might require execution after her death for the benefit of her assets. The will was after the Apportionment Act. The trust is, to pay the annuity "thereout," and for that purpose a sale or mortgage even in her lifetime might have been required; nor do the words "after the decease of my said dear wife, then," mean, in my opinion, more or less than "so subject" or "subject as aforesaid."

But I see no objection to retaining the contingent direction for a conveyance by Mr. Edward Henderson Potts, although not, in my judgment, actually necessary. A sufficient reason for there being no such objection is, as I conceive, that the will may be viewed differently by different minds, and that Mr. Wilkin's affidavit filed on the 10th of June, 1853, and the documents to which it refers, coupled with the fact that Mr. Carr (I have no doubt a credible person) has sworn what he has, and no more than he has sworn as a witness in the cause, and with the fact that his partner Mr. Spours, not being a witness at all, the absence of that gentleman as a witness has been in no manner accounted for, render, in my opinion, the conclusion unavoidable that the appellant Edward Henderson Potts, when and before the mortgage to him was executed, and when and before the agreement or undertaking of November, 1850, was prepared by Mr. Carr, had, through * 517 his solicitors Messrs. * Spours & Carr, if not otherwise, also notice of the plaintiffs' title.

The plaintiffs' costs of the appeal should be paid, I think, by the appellants.

THE LORD JUSTICE TURNER. — There are three questions in this case. First. Whether the mortgage to William Hogg for 600*l.* created by the deeds of the 25th and 26th of September, 1826, and assigned to the plaintiffs by the deed of the 3d of January, 1849, is a subsisting charge in favour of the plaintiffs upon the moiety of the Whitecross estate which formerly belonged to Alice Potts and

descended from her to the defendant John Potts. Secondly. Whether a good equitable mortgage for the sum of 900*l.* secured by the promissory note of Edward Henderson Potts, to whom the defendant John Potts was executor, and of the further sum of 166*l.* 12*s.* 10½*d.*, the amount of a shop-bill due from the defendant John Potts, was created in favour of the plaintiffs by the letters of the 5th and 7th of June, 1847, upon the three-fourth parts of the Whitecross estate which then belonged to the defendant John Potts. And thirdly. Whether, assuming a good equitable mortgage to have been created by the above-mentioned letters, the plaintiffs are entitled in respect of that mortgage to priority over the mortgage to the defendant Edward Henderson Potts created by the deed of the 28th of December, 1850.

As to the first question, the mortgage for 600*l.*, it is not disputed that Chambers, under whom the plaintiffs claim, paid to Hogg the 600*l.* secured by this mortgage; but the case on the part of the defendants is, that Chambers made this payment in order to exonerate the estate * from the mortgage * 518 for the benefit of his nephew the defendant John Potts. That he intended to make and in fact made a gift of the 600*l.* to the defendant John Potts. In support of this view the defendants rely upon the terms of the receipt for the 600*l.* indorsed upon the deed of the 26th September, 1826; upon the fact of the 600*l.* mortgage not having been mentioned in the residuary account of themselves or in that of Lee, and upon no assignment of the mortgage having been taken, and, as the defendants allege, no claim made in respect of it until the year 1849; and the defendants as to this part of their case also placed some reliance upon the affidavit of Robert Thompson, but the affidavit of Thompson, to say the least of it, is much too loose to furnish any support to the defendants' case upon this point; and so far from no claim having been made in respect of this mortgage, it appears that Chambers in his lifetime and Lee after his death received the whole of the rents of the estate although independently of the mortgage the former was entitled only to a moiety and the latter only to a fourth of the property. It also appears that on the 4th of June, 1841, Lee wrote a letter to the defendant John Potts in which he mentioned the interest on the 600*l.* as a deduction from the rents, and the defendant John Potts does not appear then to have disputed this

deduction, nor indeed at any time to have instituted any proceedings for the recovery of the portion of the rents to which he was entitled. The case of the defendants upon this point rests upon presumption merely. There is no positive evidence of any such intention on the part of Chambers as the defendants impute to him, and I think that the circumstances to which I have referred are quite sufficient to displace any inference which might be drawn from the terms of the receipt and from the residuary accounts, if

those documents were entitled to greater weight than in * 519 my opinion belongs to them. The * receipt is manifestly inaccurate, and upon a question of this nature it would be going much too far to place any reliance upon a reconveyance and not a transfer being mentioned in such a document. And as to the residuary accounts, this mortgage had not been assigned when those accounts were made out, and I observe that in neither of the accounts is there any entry under the head of "book and other debts," nor in Lee's residuary account is there any mention of his interest in the residue of Chambers's estate. I am of opinion therefore that the case of the defendants wholly fails as to the 600*l.* mortgage.

I think it fails equally on the second point, the question of an equitable mortgage being created by the letters of the 5th and 7th June, 1847. Those letters are as follows: [His Lordship read them.]

The proposal by the letter of the 5th is, that the deeds shall be retained as a security until the mortgage is executed. The answer by the letter of the 7th is, that they may be retained until the affairs are settled with Lee's executors. How can this be understood otherwise than as an assent to the deeds being retained as a security? And the settlement of the affairs which the letter contemplates was plainly a settlement by payment, for the postscript of the letter says, "I am endeavouring to arrange money matters so as either to buy or sell the property." It was urged on the part of the defendants that there had been a previous refusal by the defendant John Potts to execute a mortgage, and that it could not therefore be intended to create one by the letter of the 7th of June, but the postscript to which I have referred seems to me to explain the reason why the mortgage had been refused. Some attempt was also made on the part of the defendants to

* impeach this security on the ground that the equitable mortgage was to the extent of the 900*l.* merely voluntary on his part, but I think a sufficient consideration is shown. * 520

The only remaining question is that of priority. The case was much argued upon that point with reference to the question of notice; but, except as notice may be material upon the point whether in the event of a foreclosure a conveyance ought to be directed of the one-fourth of the estate to which the defendant John Potts became entitled under the will of Chambers, I do not think it necessary to decide the question of notice; and as my learned brother is of opinion that there is sufficient proof of notice, it is unnecessary for me to say more upon the point than that I incline to that opinion also, although my mind is not free from doubt upon the subject. My learned brother's opinion is sufficient to maintain the decree directing a conveyance. In my opinion the question of notice is not material beyond what I have mentioned, because I think that the defendant John Potts did not take under the will of Chambers the legal estate in the fourth part of the estate thereby devised to him. [His Lordship read the material parts of the will.]

Under this devise, I apprehend that if the annuity was in arrear the trustees would be bound to raise the arrears by sale or mortgage, and they must take the fee in order to enable them to do so. The authorities, I think, support this conclusion. In *Jenkins v. Jenkins* (a) there was a gift of 5*l.* a year, to be paid to the annuitant, out of the premises there in question, by the executor as long as the annuitant should live, and to be paid quarterly, and it was * held that the executors took the fee. * 521 Lord Ellenborough, adverting to this case in *Doe v. Simpson*, (b) distinguished it upon the ground, amongst others, that the annuity was to be paid out of the estate, and not out of the rents and profits merely. Perhaps it might also have been distinguished upon the ground that the land was given to the executor; but this latter distinction does not apply to the case of *Doe v. Woodhouse*. (c) There the devise was as follows: "I give unto my brother William Heys 40*l.* yearly, to be paid to him by four quarterly payments during his natural life by my executors hereafter named, out of my whole estate. I give unto my cousin John

(a) 1 Wille, 650.

(b) 5 East, 162.

(c) 4 T. R. 89.

Heys 6*l.* yearly, to be paid him by four quarterly payments during his natural life by my executors hereafter named, out of my whole estate. The aforesaid dividend of the money arising from the sale of my goods, and the yearly payments out of my estates to my brother William Heys and to my cousin John Heys, are not to commence till after the death of my loving wife Catharine Heys. The remainder of the profits after the death of my loving wife, Catharine Heys, after the yearly payments made to my brother William Heys, and my cousin John Heys out of my whole estate, I give to be divided amongst Thomas Heys, George Heys, and Jane Heys, sons and daughter of William Heys, equally share and share alike;" and it was held that the executor took the fee. Upon these authorities, as well as upon principle, I think it must be so held in this case, and that this decree therefore must be affirmed, except so far as it declares the legal estate to be vested in the defendant John Potts. In this respect I think it must be altered, but looking to the nature of the defence, I think the appellants must pay the costs of the appeal.

1856. July 21. Before the LORDS JUSTICES.

The word "unmarried" in one part of a settlement held to mean not having a husband, although in another it was clearly used in the sense of "without having been married."

A fund was settled in contemplation of marriage, upon trust for the wife for life, then for the husband for life, then for the children of the marriage equally (subject to a power of appointment among them), to be paid at twenty-one, or in the case of daughters, on their attaining that age or marrying; and in the event of any of them, being a son or sons, dying under twenty-one, or being a daughter or daughters dying under that age and "unmarried," the share of such child was to accrue among the others; with an ultimate trust, in the event of no child attaining a vested interest and of the wife dying in the husband's life, for such person or persons as would have been entitled to her personal estate under the Statute of Distributions if she had died "unmarried" and intestate: *Held*, that the word "unmarried" in the ultimate trust was to be construed "not having a husband at the time."¹

¹ See 1 Jarman Wills (3d Eng. ed.), 486-489.

THIS was an appeal from a decision of the Master of the Rolls on the construction of a marriage settlement, whereby the husband's father, in consideration of the marriage and of the wife's fortune, which was to be given up to the husband, covenanted that he or his representatives should, within three months after the death of himself or his son, whichever should first happen, pay to the trustees of the settlement the sum of 1000*l.*, to be held upon trusts expressed as follows:—

“Upon trust that they, the said Jonah Pynsent Mathew and Edward Broom, or the survivor of them, or his executors or administrators, do and shall pay the yearly interest, dividends, or produce of the said principal sum of 1000*l.* unto the said Eliza Wood and her assigns for her and their own use during her life; and it is hereby agreed and declared that the receipt and receipts of the said Eliza Wood shall be a good and effectual discharge for so much thereof as shall be therein acknowledged or expressed to be received, and that the same shall not be subject or liable to the debts, control, or engagements of the said Henry Pratt; and the said Eliza Wood doth hereby consent and agree that the provision hereinbefore and also hereinafter made for her shall be in full for her *jointure, and in lieu, bar, and satisfaction of *523 and for all dower and thirds which she the said Eliza Wood can or may claim of, into, or out of all and every or any of the lands, personal property, and effects whereof the said Henry Pratt now is, or at any time hereafter during the said intended coverture shall be, seised or possessed; and from and immediately after the death of the said Eliza Wood, upon trust that they, the said Jonah Pynsent Mathew and Edward Broom, or the survivor of them, his executors or administrators, do and shall pay the yearly interest, dividends, or produce of the said principal sum of 1000*l.* unto the said Henry Pratt and his assigns during the term of his natural life, for his and their own use and benefit; and from and immediately after the death of the survivor of them, the said Eliza Wood and Henry Pratt, upon trust that they, the said Jonah Pynsent Mathew and Edward Broom, do and shall stand and be possessed of the said principal sum of 1000*l.*, in trust for such child or children of the said Eliza Wood by the said Henry Pratt to be begotten, in such shares and proportions, and to be paid and transferred at such age or ages, time or times, and with such benefit of survivorship or otherwise, as the said Henry Pratt and Eliza

Wood, his intended wife, by any deed or instrument in writing to be by them signed, sealed, and delivered in the presence of and attested by one or more credible witness or witnesses shall jointly direct or appoint, and in default of such joint direction or appointment, or as to so much thereof whereof no such complete direction or appointment shall have been made, upon trust for such child or children of the said Eliza Wood by the said Henry Pratt to be begotten, in such parts, shares, and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise as the survivor of them, the said Henry Pratt

and Eliza Wood his intended wife, by any deed or instrument in writing to be * sealed and delivered by such survivor in the presence of and attested by one or more credible witness or witnesses, or by the last will and testament of such survivor, to be by him or her signed and published as by law required, shall direct or appoint; and in default of such direction or appointment, or as to so much of the said trust moneys whereof no complete direction or appointment shall have been made, in trust for all and every the children of the said Eliza Wood by the said Henry Pratt to be begotten, equally to be divided between them (if more than one) share and share alike; and in case there shall be but one such child, then in trust for such one or only child for his, her, or their portion or portions, the parts and shares thereof or the whole thereof to be paid to such children or child in manner following (that is to say), — the part or share, parts or shares, of such of them as shall be a son or sons to be paid at his or their age or ages of twenty-one years, and the part or share, parts or shares, of such of them as shall be a daughter or daughters to be paid to her or them at her or their age or ages of twenty-one years or day or days of marriage, which shall first happen after the decease of the survivor of them the said Henry Pratt and Eliza Wood; and in case any such son or sons shall attain the age of twenty-one years, or any such daughter or daughters shall attain the like age or be married under such age in the lifetime of the said Henry Pratt and Eliza Wood, his intended wife, or of the survivor of them, then and from thenceforth all and every the right and interest or rights and interests of such son or sons, daughter or daughters respectively, in and to the said sum of 1000*l.* shall be and be considered as a vested interest or as vested interests in the same son or sons, daughter or daughters respec-

tively at the time or times aforesaid, and shall be transmissible as such to his, her, or their executors, administrators, or assigns, notwithstanding their, his, or her death afterwards in the * lifetime of the said Henry Pratt and Eliza Wood, or of * 525 the survivor of them: Provided always, and it is hereby declared and agreed that if any such child, being a son, shall die under the age of twenty-one years, or, being a daughter, shall die under the age of twenty-one years and unmarried, then the share hereby intended for each such son and daughter as aforesaid in the said sum of 1000*l.* shall from time to time go and accrue to the survivor or survivors and others or other of the said children, and the respective executors, administrators, and assigns of such of them as may be dead, having first acquired a vested interest in their respective original shares, and be equally divided between or amongst such survivors and others of them, and the said representatives of those who shall be dead, if more than one, share and share alike, and the same shall become vested and payable, or transferable at such and the same ages and times as his, her, or their original share or shares, or as near thereto as circumstances will permit, and such benefit of survivorship or accruer shall extend as well to the surviving or accruing as to the original shares." And after making provision for the maintenance, education, and advancement of the child or children of the marriage, until the 1000*l.* should become payable to them, the deed proceeded as follows: "Provided also, and it is hereby further declared and agreed by and between the said parties to these presents, that if there shall not be any children or child of the said intended marriage, or there being such, all of them shall die without having acquired a vested interest in the said sum of 1000*l.* under the trusts hereinbefore declared, then the said Jonah Pynsent Mathew and Edward Broom, or the survivor of them, his executors or administrators, shall stand and be possessed of the said sum of 1000*l.* or of so much and such part thereof as shall not have been applied and disposed of for the maintenance, education, or advancement in life of any such child or * chil- * 526 dren as aforesaid, upon the trusts following (that is to say), — in case the said Henry Pratt shall die in the lifetime of the said Eliza Wood, then upon trust immediately after his decease and such failure of children as aforesaid, or as soon as the moneys can be gotten in as aforesaid, to pay, transfer, and make over the

same sum of 1000*l.* unto her, the said Eliza Wood, her executors, administrators, and assigns, for her and their own use and benefit; but in case the said Eliza Wood should die in the lifetime of the said Henry. Pratt, then upon trust immediately after his decease and such failure of children as aforesaid, to pay, transfer, and make over the same sum as aforesaid to such person or persons upon such trusts and for such intents and purposes, and in such parts, shares and proportions, manner and form, as the said Eliza Wood shall at any time or times during her life, notwithstanding her intended coverture, by her last will and testament in writing or any codicil thereto, to be by her duly executed, direct or appoint; and in default of such direction or appointment, then upon trust to pay, transfer, and make over the same sum, or so much thereof whereof no such direction or appointment shall be made, unto such person or persons as would have been entitled to the personal estate of her, the said Eliza Wood, under and by virtue of the Statute of Distribution of Intestates' Estates, in case she had died unmarried and intestate."

The wife died intestate in the lifetime of the husband.

There were three children of the marriage, two of whom died in her lifetime, infants, and without having been married. The third survived her, and died in the husband's lifetime under twenty-one, and without having been married.

The Master of the Rolls decided that "unmarried" meant * 527 "not having a husband at the time;" that the * child was therefore entitled, and that the fund therefore now belonged to the personal representatives of the husband.

The case is reported in the 22d volume of Mr. Beavan's Reports. (a)

Mr. Cairns and *Mr. A. Smith*, in support of the appeal. — Authorities on the construction of wills do not govern this case, which is one of a settlement, and, therefore, of contract. The property is the portion of the wife, and the intention is first to provide for the husband and wife, and the issue to the extent specified, and no further; secondly, to give complete power to the wife on failure of issue; and, thirdly, in that event to carry back the lady's fortune to her relatives as if the marriage had never taken place. *Cotton v. Scarancke*, (b) *Smith v. Smith*. (c)

(a) Page 328.

(b) 1 Madd. 45.

(c) 12 Sim. 317.

The word "unmarried" is of flexible import. *Smith v. Smith.* (a) The cases relied upon below are all distinguishable from the present. In *Hoare v. Barnes*, (b) the words were "sole and unmarried," meaning, therefore, sole, and there was no provision for the issue of the marriage. In *Maugham v. Vincent*, (c) there was no express provision for children. *Coventry v. Lauderdale* (d) was a case not of a settlement, but of a will. In *Re Norman's Trusts* (e) there was no limitation of the second moiety in favour of issue, and the words used were "without being married." The power of appointment * to children would * 528 have enabled the parents to appoint to a son marrying under twenty-one, which would prevent his children from being left unprovided for. It is not therefore necessary to vary the construction of "unmarried" in order to remedy the possible mischief of a son dying under twenty-one leaving issue, and the proposed construction would not remedy the mischief unless there were no other children of the marriage who attained a vested interest.

On the other hand there are many authorities where "unmarried" has been held to mean "not having been married."

They referred to *Goshawke v. Chiggell*, (g) *Framlingham v. Brand*, (h) *Maberly v. Strode*, (i) *Bell v. Phyn*, (k) *Doe v. Cooke*, (l) *Doe v. Rawding*, (m) *Hall v. Robertson*, (n) *Re Thistlethwayte's Trust*. (o)

Mr. Lloyd and Hanson, for the personal representatives of the husband, in support of the decree.

[The Lord Justice TURNER referred to the use of the word "unmarried" in the accruer clause.]

The word in that clause means not having been married because it is there used in contradistinction to marrying under twenty-one, but in the ultimate gift there are two cases, that of the wife dying

(a) 12 Sim. 317.

(c) 4 Jur. 452; 9 Law J. (N. S.) Ch. 329.

(d) 10 Jur. 793.

(e) 3 De G., M. & G. 965.

(g) Cro. Car. 154.

(h) 3 Atk. 390.

(i) 3 Ves. 450.

(b) 3 Bro. C. C. 316.

(k) 7 Ves. 453.

(l) 7 East, 269.

(m) 2 B. & A. 441.

(n) 4 De G., M. & G. 781.

(o) 1 Jur. N. S. 881.

in the lifetime of her husband, and that of her surviving
 * 529 him. The * word “unmarried” is only used for the purpose of excluding the husband.

They referred to *Withy v. Mangles*. (a)

Mr. Karlake, for the trustees.

Mr. Fischer, for other parties interested.

Mr. Cairns, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The conclusion at which the Master of the Rolls has arrived appears to me so manifestly right that I am surprised at the appeal. The word “unmarried” is used twice in the settlement; first, for the purpose, only, of stating the converse case to that of a daughter marrying during minority. In the second instance, it is used to designate the converse case to that of a woman dying having a husband, and it is there to be understood as referring to the case of her dying not having a husband. If this is not of itself enough to exclude all doubt, more than enough is supplied in aid of that construction by the fact that the construction for which the appellants contend would in a possible event exclude grandchildren of the wife in favour of her brothers and sisters.

THE LORD JUSTICE TURNER. — Without saying that I consider the case so clear as it appears to my learned brother, I also concur in the conclusion at which the Master of the Rolls has
 * 530 arrived. * The settlement may be considered in two points of view, as it affects the husband, and as it affects the children of the marriage. The intention apparent on the fact of the settlement is to exclude the husband, and, so far as this goes, it is in favour of the view taken by the Master of the Rolls. As to the children the settlement does not provide for all the possible issue of the marriage. And it is to be inferred from this, that so far as they were not provided for they were intended to be subject to the dominion of the wife, either under the absolute ownership which,

(a) 4 Beav. 358.

if the prior express trusts were exhausted, she would acquire in the event of her surviving her husband, or under the power of appointment which she had in the event of her not surviving him. It would be too strong to put upon so doubtful a word as "unmarried" in an instrument made for the purpose of providing for the issue of the marriage, a construction which would, in favour of the wife's relatives, exclude issue of the marriage.

The appeal must be dismissed with costs.

* WALKER v. ARMSTRONG.

* 531

1856. July 14, 19. Before the LORDS JUSTICES.

A deed may be reformed so as to be plainly confined to the object intended, where its operation as it stands is doubtful.¹

An appointment under a settlement limited the settled estates to such uses as a husband and wife should jointly appoint, but by mistake omitted to give them life-estates. On discovering the error, they instructed a solicitor to frame such a deed as would remedy it. The solicitor prepared a deed which remedied the defect, but was framed by way of complete relimitation of the uses, and thus raised a question whether a testamentary appointment which the wife had made in the mean time, but of which the solicitor was unaware was not revoked: *Held*, a proper case for reforming the deed.²

¹ On the trial by jury of an issue whether the parties to a deed intended to have a clause inserted therein, but omitted by mistake to have it done, the intention and mistake must be proved beyond a reasonable doubt, and not merely by preponderance of evidence. *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; see *Fry Spec. Perf.* (2d Am. ed.) 312, § 505, and cases in n. (11). The mistake must have been mutual. *Sawyer v. Hovey*, 3 Allen, 331; *Andrews v. Essex Ins. Co.*, 3 Mason, 10; *Green v. Morris*, 1 Beasley (N. J.), 170; *Canedy v. Marcy*, 13 Gray, 373; *Nevius v. Dunlap*, 33 N. Y. 676; *Shay v. Pettes*, 35 Ill. 360; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Earl of Bedford v. Earl of Romney*, 30 Beav. 431; *Garrard v. Frankel*, 30 Beav. 445; *Durant v. Bacot*, 13 N. J. Ch. 201; *Brown v. Lamphear*, 35 Vt. 252; *Glass v. Hulbert*, 102 Mass. 24, 34; 1 *Sugden V. & P.* (8th Am. ed.) 171, and in notes; *Fry Spec. Perf.* (2d Am. ed.) 308, § 497; 2 *Dart V. & P.* (4th Eng. ed.) 681; *Metcalfe v. Putnam*, 9 Allen, 97.

² See 1 *Lead. Cas. in Eq.* (3d Am. ed.) 73 [34]; *Bold v. Hutchinson*, 5 De G., M. & G. 558; 1 *Sugden V. & P.* (8th Am. ed.) 172; 2 *Dart V. & P.* (4th Eng. ed.) 695 and n. (d); 1 *Lead. Cas. in Eq.* (3d Am. ed.) 73, [34].

THIS was an original hearing arising out of an appeal from a decision of the Master of the Rolls, reported in the 21st volume of Mr. Beavan's Reports.(a)

On the marriage of the plaintiff Captain Robertson Walker with his late wife in June, 1824, a settlement was made by which her property, consisting of two estates, to one of which she was entitled under her brother's will, was limited to such uses as the husband and wife should jointly appoint by deed, and in default of such appointment, to the use of trustees and their heirs during the joint lives of the husband and wife in trust, as to one-half, to pay the rents and profits to the husband during the joint lives of himself and his wife, and, as to the other half, to pay the rents and profits thereof to the wife for her separate use during their joint lives, and upon the death of either to the use of the survivor for life. Subject to these limitations the estate derived from the brother was limited to such uses as Mrs. Walker should appoint, either by deed or will, and in default of such appointment to the use of her first and other sons in tail male, with remainder to the use of her daughters as tenants in common in tail general, with cross remainders between them in tail. In default of such issue, the estate was limited to Robert Baynes Armstrong, the first defendant, for life, with remainders to his first and other sons in tail male, with remainders over for life and in tail,

* 532 * under which Anthony Benn, one of the defendants, was the first tenant in tail in *esse*. As to the other estate, the limitations were to the use of the children of the marriage as Captain and Mrs. Walker, or the survivor, should appoint by deed, and in default of appointment to the use of the children as the survivor should by deed or will appoint, and in default of appointment to the same uses as those limited of the other estate in default of appointment by Mrs. Walker.

Some time after the execution of the settlement it was observed, that, according to these limitations, the daughters of a son of the marriage would not in any event take, and it was also observed that the settlement contained no power enabling Mrs. Walker to dispose of the estate not derived from her brother, in case there should be no issue of the marriage.

Mr. and Mrs. Walker desired that these errors might be cor-

rected. Accordingly, a deed of appointment, dated the 17th of May, 1825, was prepared, and was executed by Captain Walker and his wife of the one part and the trustees of the other part. This deed recited the desire of Captain and Mrs. Walker to exercise the joint power of appointment, and then proceeded to limit and appoint both the estates to such uses as both husband and wife should by deed jointly appoint, and in default of any such appointment as follows: So far as regarded the estate derived from her brother, to such uses as Mrs. Walker should appoint by deed or will, and in default of any such appointment to the use of the first and other sons of the marriage in tail general, with remainder to the use of the daughters of the marriage as tenants in common in tail general, with cross-remainders among them in tail, and in default of such issue to such uses as Mrs.

Walker should by deed or will appoint, and in * default of * 583 such appointment to the uses limited by the original settlement to take effect after the limitations to the daughters of Mrs. Walker. So far as regarded the estate not derived from the brother, it was declared that it should remain (subject to the above joint power of appointment, and subject to the uses in the original settlement limited to take effect during the lives of Captain and Mrs. Walker and the survivor of them) to the use of the children of the marriage in such manner as Captain and Mrs. Walker should by deed jointly appoint, and in default of such appointment to the uses limited by the deed now in statement to take effect concerning the lands derived from her brother; provided always, that in case there should be a failure of issue of the marriage, Mr. Walker should have a general power of appointing by will the hereditaments not derived from her brother.

In February, 1827, Mrs. Walker made her will, by which, after reciting the power contained in the original settlement, she, by virtue of that and every other power enabling her so to do, appointed all the settled lands and hereditaments, as to part, to certain persons, members of the Armstrong family, and as to the remainder to the plaintiff, her husband Captain Walker absolutely.

Many years afterwards, Captain and Mrs. Walker having occasion to deal with some portion of their property, the settlements were laid before a professional gentleman, who pointed out the omission which existed in the deed of 1825, of any limitation of life estates to Captain and Mrs. Walker. On their instructing

him as mentioned below to remedy the defect, he prepared the deed in question in the cause, which was dated the 24th of October, 1840, and made between Captain and Mrs. Walker of the

* 534 one part, and the surviving trustees of the * original settlement of the other part. It recited the indentures of June, 1824, and of May, 1825, and that Captain and Mrs. Walker were desirous of varying the limitations contained in the settlement, and of limiting the estates to the uses thereafter declared. By the witnessing part Captain and Mrs. Walker appointed the estates, as well those derived from the brother as the others, to such uses as Captain and Mrs. Walker should by deed appoint, and in default thereof during the joint lives of Captain and Mrs. Walker, as to one-half in trust for Captain Walker and as to the other half, in trust for the separate use of Mrs. Walker, and after the decease of either to the use of the survivor for life, and after the decease of the survivor, to such uses as Mrs. Walker should by deed or will appoint, and in default of appointment, to uses under which the defendants were interested. This deed omitted all limitations in favour of issue, but there had never been any, and Mrs. Walker was advanced in life.

In December, 1854, Mrs. Walker died without issue, without having altered or republished her will, and without having revoked it, unless the deed of 1840 operated as a revocation.

When the cause was heard before the Master of the Rolls the bill did not seek to reform the deed of 1840, and the arguments and judgment proceeded, therefore, on the supposition that the intention of those who executed that deed, and the title to the property, was to be governed or affected by it according to its actual tenor, according to its true construction in its actual state. On this hypothesis the Master of the Rolls dismissed the bill, and the plaintiff appealed. When the appeal first came on, their Lordships thought from the materials then existing in the suit, that there was a probability or reasonable possibility that

* 535 the instrument of 1840 had been executed * in mistake, and might be properly, to some extent at least, impeached or questioned on that ground. They therefore gave the plaintiffs leave to amend the bill, and to the plaintiffs and defendants permission to add to the evidence.

The bill having been amended accordingly, and additional evidence having been adduced, it appeared by the pleadings and evi-

dence in their altered state, that the mistake in the instrument of 1825 having been discovered after the year 1827, Captain and Mrs. Walker, in 1840, gave instructions to their then solicitor, Mr. Wil-son Perry, to prepare such a deed as might be necessary to correct the mistake, and that Captain and Mrs. Walker in executing the instrument of the 24th of October, 1840, considered and understood it as providing for that object and doing nothing more, and that so far as it exceeded that particular and restricted purpose, it was contrary to their wish, and executed in error.

The Solicitor-General, Mr. Roundell Palmer, and Mr. Cole, for the plaintiff.—This is a plain case for reforming the deed, for there never was any intention to affect the property beyond the life of the survivor of the appointors. But even if the deed should not be reformed, there is no revocation of the will.

They referred to *Duke of Bedford v. Abercorn*, (a) *Marquis of Exeter v. Marchioness of Exeter*, (b) *Tweddell v. Tweddell*, (c) *Barston v. Kilvington*, (d) *Jenkins v. Quinchant*, (e) *Marquis of Breadalbane v. Marquis of Chandos*, (g) *Elbeck v. Wood*, (h) *Plowden * v. Hyde*, (i) *Parsons v. Freeman*, (k) * 586 *Evans v. Evans*, (l) *Vawser v. Jeffery*, (m) *Thurston v. Cunningham*, (n) *Wigsel v. Smith*, (o) *Williams v. Owens*. (p)

Mr. Rolt, Mr. Lloyd, and Mr. Osborne, for the defendants Benn.—There is no error in the frame of the deed; the error (if any) was in the appointors not being, in fact, aware of the legal consequence of the limitations in revoking a will. But ignorance of the legal consequence of a deed has never been held sufficient ground for altering its provisions. The appointors well understood the nature of the deed, and with the question whether they knew its legal effect the Court has nothing to do. In order to rectify a deed there must be clear evidence that the deed does not effect the inten-

(a) 1 Myl. & Cr. 312.

(b) 3 Myl. & Cr. 321.

(c) Turn. & R. 1.

(d) 5 Ves. 593.

(e) 5 Ves. 596, n.

(g) 2 Myl. & Cr. 711.

(h) 1 Russ. 564.

(i) 2 De G., M. & G. 684.

(k) 3 Atk. 741.

(l) 1 Drew. 654.

(m) 16 Ves. 519.

(n) 2 W. Black. 1046.

(o) 1 Sim. & St. 321; 5 Russ. 299.

(p) 2 Ves. 595.

tion, and also what the intention would have been if the parties had been correctly informed. There is no evidence to show that the revocation of the will was contrary to Mrs. Walker's intention. The instructions were to correct the mistake, and in all other respects the estates were to go as before, leaving it to the solicitor to decide how this was to be done. The deed of 1840 entirely carried into effect these instructions. It had, it is true, another effect which might not have been in contemplation, but that is no cause for reforming the deed. An absence of intention to revoke the will is not sufficient ground for altering the deed. Suppose the instructions had expressly directed the estate to be relimited as it now is in the deed, there would in that case have been equally no intention to revoke the will, but it will not be pretended

* 537 that the deed could then * have been altered. There were two modes of effecting the intention, one revocatory of the will, the other not. Does it make any difference that the revocatory mode was adopted? The mode in which the intention was carried into effect was submitted to the appointors and approved of by them. If the appointment should be set aside because the solicitor did not fully explain to his clients all the legal consequences of that mode of effecting their intention, a principle would be introduced of most extensive and mischievous operation. But as has been already urged, there is no mistake in the settlement. The mistake was in not re-executing the will. The object of rectification is not to set up an independent instrument which would otherwise be destroyed.

They referred to *Fielder v. Studley*, (a) *Parke v. Lamb*, (b) *Tickner v. Tickner*, (c) *Lock v. Foote*, (d) *Brydges v. Chandos*, (e) *Harwood v. Oglander*, (g) *Lord Langford v. Little*. (h)

Mr. Borton, for Robert Baynes Armstrong.

Mr. Pole, for Richard Baynes Armstrong.

Mr. Prendergast, for William and Elizabeth Pattinson.

(a) Cited in 1 Bos. & P. 575.

(e) 2 Ves. 417.

(b) 1 Bro. P. C. 160.

(g) 8 Ves. 106.

(c) 1 Sugd. on Powers, 107.

(h) 2 Jo. & Lat. 613.

(d) 5 Sim. 618.

The Solicitor-General, in reply.

Judgment reserved.

January 31.

* THE LORD JUSTICE KNIGHT BRUCE. — This litigation * 538 owes its origin to the manner in which a series of professional gentlemen in the north of England permitted themselves to transact, or in more accurate phrase to entangle and perplex, some legal business intrusted to their care. These licensed pilots undertook to steer a post captain through certain not very narrow straits of the law, and with abundance of sea-room ran him aground on every shoal that they could make. First in 1824, then in 1825, and again some years afterwards, was the gallant officer incumbered with help of a description for which he could perhaps supply a better term than I can. The crowning effort was in 1840, with reference to which, I may say, that seemingly the whole of the costs of the cause on each side, as between solicitor and client, ought to be borne in a quarter upon which neither this nor any other Court has probably the power to throw them. The circumstances are these.

A settlement made in June, 1824, on the marriage of the plaintiff Captain James Robertson Walker and his late wife Anne Walker, gave a joint power of appointment to them over the whole, and also a power of testamentary appointment (notwithstanding coverture) to the lady over some at least, of the real estates here in contest. The settlement in other parts of it was erroneously framed, and for the purpose of curing the mistake or mistakes they executed in the year 1825 under the joint power an instrument of appointment, which, correcting after a fashion that error or those errors, committed or was affected by another error or other errors.

The instrument of 1825 did perhaps, by way of confirmation or repetition, perhaps by way of new creation, perhaps in each way, but did certainly and properly, give * to Captain and * 539 Mrs. Robertson Walker a joint power of appointment, and to her a testamentary power of appointment (notwithstanding her coverture) over the whole of the property. But the same instrument, through misapprehension or carelessness, or unskilfulness, was so framed as to take away or place in peril, as concerning the

whole or part of the property, the life-interest which but for it one or each of them would, under the settlement of 1824, have had until execution of the powers or one of the powers conferred by it, and in default of execution of that power or those powers. This taking away, this imperilling, which was of course contrary to their meaning and wish, seems not to have been discovered by Captain Robertson Walker or his lady or communicated to either of them until some considerable time after the year 1827, the year when, in exercise of the testamentary power or testamentary powers of appointment then vested in her, she made the will or testamentary appointment of the 28th of February, 1827, which it is, and originally was, the object of the present suit to establish, the plaintiffs being devisees or appointees named in it. This will, this testamentary appointment, was and is of clear and undisputed validity, subject only to the question whether a deed or instrument, not testamentary, which Captain and Mrs. Robertson Walker executed in the year 1840, and which is dated the 24th of October in that year, had the effect of destroying or revoking the will or testamentary appointment or depriving it of all efficacy — the plaintiffs asserting the negative, the defendants or two or more of them the affirmative of that proposition. There is no other controversy. When the cause was heard at the Rolls, the bill was understood and treated, and probably with correctness understood and treated, as proceeding on the hypothesis that the instrument of 1840 expressed the intention which those who executed it had in executing it, and that the title to the property in dispute * was to be governed or affected by it according to its actual tenor, according to its true construction in its actual state, and by the view which the Master of the Rolls took of the instrument thus considered he was induced to dismiss the bill.

When the appeal against the dismissal was first brought before us, we thought, from the materials then existing in the suit, that there was a probability or reasonable possibility that the instrument of 1840 had been prepared in error, had been executed in mistake, and might be properly, to some extent at least, impeached or questioned on that ground. We therefore gave to the plaintiffs leave to amend the bill, and to the plaintiffs and defendants permission to add to the evidence, a course scarcely or not at all opposed by any of the parties to the record.

The bill having been amended accordingly, and, as amended,

answered by Messrs. Benn, the two most adverse defendants, and additional evidence having been adduced, it is obvious that we have to dispose of a case materially different from the case decided at the Rolls, nor has the *ratio decidendi* of his Honor been the subject of any opinion hitherto expressed by us. Now, by the pleadings and evidence in their present state, it is clearly established that the mishap, to which I have already adverted, in the instrument of 1825 having been discovered after the year 1827, and Captain and Mrs. Robertson Walker having been in the year 1840 advised to cure it, they, in that year, resolved to do so, and gave instructions for the purpose to their then solicitor Mr. Wilson Perry, who, in consequence, though unluckily not correctly in pursuance, of those instructions prepared and framed the instrument of 1840, but in so doing, whether by misapprehension or otherwise, * whether without or with a motive, he went materially * 541 beyond his instructions and authority. It is shown and stands proved manifestly, that Mr. Perry had been on that occasion instructed and authorized by Captain and Mrs. Robertson Walker to prepare, and ought to have prepared, an instrument for the limited and mere purpose of restoring, confirming, or assuring a life-interest in the estates in question to Captain Robertson Walker, or to that gentleman and his wife respectively (the life-interest, namely, which by the instrument of 1825 had been improperly subverted or placed in doubt or danger), and that they, in executing the instrument of 24th October, 1840, considered and understood it as providing for that object, and doing nothing more, and that, so far as it exceeded that particular and restricted purpose, it was contrary to their wishes, opposed to their intention, and executed by them in error.

But it is plain that the instrument of October, 1840, if it had been prepared and executed in the form and shape intended and understood by them, and had accordingly not gone beyond the object already mentioned, would have left her testamentary appointment of the 28th February, 1827, either wholly unaffected, or not beyond the life of Captain Robertson Walker, and therefore not to his prejudice, affected. The instrument of 1840, however, considered in its present form and shape, may be and has been very plausibly contended and has indeed by the Master of the Rolls been thought to have had the effect of revoking the testamentary appointment of February, 1827, wholly, or taking away all efficacy

from it. Now an instrument open reasonably (whether without or with solid foundation) to such an argument, an argument held by a learned Judge to be sound, must * form a blot on the title of the plaintiffs as devisees named in the testamentary appointment; and it follows, in my judgment, that they are entitled to have the instrument of 1840 reformed and corrected, or treated as reformed and corrected, so as plainly and without any possible doubt to confine its operation to carrying into effect the instructions and intention of the parties to it, without going beyond those instructions and that intention, the result being the prevalence and establishment of the will or testamentary appointment of 1827 in favour of Captain Robertson Walker and the other plaintiffs.

I have used the word "blot" with a view to guard myself against being understood to express an opinion that the instrument of 1840, if considered as binding according to its actual tenor, ought to be deemed to have revoked the will wholly or taken away all efficacy from it, or removed it out of the way of the defendants Messrs. Armstrong and the defendants Messrs. Benn, who, or three of whom, under the instruments of 1824 and 1825, are interested in disputing the will. That is a point which, thinking it not now substantially important, I leave, so far as my judgment is concerned, undecided. The record and evidence, when the cause was at the Rolls, were in a state very different from their present condition.

THE LORD JUSTICE TURNER. — I think it unnecessary to give any opinion how the case would have stood if the deed of 1840 had been free from objection, I am of opinion that the deed of 1840 went beyond the instructions, and beyond the intention of * 543 the parties and therefore that the will must have effect. * That the deed of 1840 went beyond the instructions is quite plain upon evidence. The instructions were merely to correct the mistake in the deed of 1825, which reached only to the life-interests, but what was done by the deed of 1840 was to deal with the entire fee.

It was argued, on the part of the respondents, that the instructions went further, that they were to correct the mistake, and let every thing else go as before; and that the course adopted by the deed of 1840 was the mode, and the proper mode, adopted by the

solicitor to carry out those instructions. But the evidence, I think, shows that if every thing beyond the life-interests was to go as before, it was to do so by the interests being left undisturbed, and not by their being displaced and re-created. Reliance was placed on an entry in Mr. Perry's bill of costs, which deals with the instructions as being "to vary the uses and correct the errors." But it is to the evidence, not to Mr. Perry's bill of costs, that we must attend, and even if it was otherwise no weight would be due to the entry in the bill of costs, for the errors could not be corrected without the uses being varied. It was further argued, on the part of the respondents, that the appellant and his wife must have known the contents of the deed, and be taken to have intended to do what was done by it. But the evidence proves that the deed was executed (as of course it would be) upon the faith of its carrying out the instructions. Reliance was also placed on the part of the respondent on the solicitor not having been aware of any will having been made by Mrs. Walker. But this does not seem to me to affect the question before us. I think that it leaves the legal question just where it stood, and goes no further than to acquit the solicitor from any moral blame, and certainly I do not think that any moral * blame whatever ought to * 544 have been or ought to be imputed to him.

Upon the whole, therefore, I feel no doubt that the deed of 1840 went beyond the instructions, and beyond the intention of the parties, and what then is the consequence? The very principle of this Court in correcting instruments is, that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed, and, adopting this principle, the will must in this case be supported.

The respondent's argument throughout rested on this basis, that this is a case in which there were two modes of doing the same thing, and that it was left to the solicitor to determine which mode should be adopted, and that he adopted the mode which is in question. But this argument seems to me fallacious. The answer to it is, that to correct the mistake was one thing, and that to correct the mistake and to do a great deal more was another, and that the latter course and not the former was adopted. One view of this case, which appears to me to be decisive is, what answer could have been given to Mrs. Walker if she had come to this Court to have the instrument corrected? I apprehend that her right to

this relief would have been indisputable, and I think that her devisees have the same right.

It was strongly urged in the argument that by supporting the will we should disturb the decided cases, and it was said that every case in which a will was revoked by change of estate was a case of mistake. But this case stands quite distinct from all the decided cases. We have here distinct proof of what was intended

to be done, and that what has been done has gone beyond
 * 545 what * was intended to be done. In the decided cases there was no such proof, and in my opinion it would be a great error on our part to hold this case to be governed by the decided cases. We could not, I think, do so without repudiating a well-established principle and doctrine of the Court.

The following were the terms of the decree made on the appeal:—

It appearing to this Court that the plaintiff and his late wife A. R. Walker in the pleadings named, directed and caused the said indenture of the 24th of October, 1840, to be prepared with the view and intent and for the purpose that the hereditaments therein comprised should during their lives and the life of the survivor be held to, upon, and for and subject to such and the same uses, trusts, intents, and purposes as if the said indenture of the 17th of June, 1825, had not been executed, and with no other view, intent, or purpose; and it also appearing to this Court that the plaintiff and his said late wife executed the said indenture for the purpose aforesaid, and for no other purpose, and that the said indenture, in so far as the same was of form and tenor as to have any further operation or effect, was to that extent made and executed in error and against the intention of the said plaintiff and his wife, and was executed by them under mistake: Declare, that the deed of October, 1840, ought not to operate or take effect, except in so far as respects the life-interests thereby limited to and in favour of the plaintiff and his late wife and the survivor of them. And declare, that the will or testamentary instrument of the 25th of February, 1827, executed by the said plaintiff's said late wife, is valid and effectual as a testamentary appointment by the said plain-
 * 546 tiff's said late wife * under or by virtue of such powers of testamentary appointment as were and are contained in the

indenture of the 23d of June, 1823, and the 17th of May, 1825, in the pleadings mentioned, or under or by virtue of one of such powers. And let the said will or testamentary appointment be established.

DRYSDALE v. PIGGOTT.

1856. July 19. Before the LORDS JUSTICES.

A debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life in the creditor's name, as a collateral security. The policy was effected, but after a time neither the debtor nor his surety paid the premiums on the policy, though required to do so by the creditor, who paid them himself: *Held*, on the death of the debtor, that he and his surety had not abandoned the policy, but that it was redeemable by the surety on repayment of the premiums paid by the debtor.¹

THIS was an appeal from the decision of the Master of the Rolls dismissing the bill of the plaintiff Stoddart Drysdale, whereby he sought a declaration that the defendant Frederick Piggott might be declared a trustee for him of a policy of assurance effected on the life of the plaintiff's son Pattison Drysdale, since deceased, and prayed for consequential relief.

In January, 1851, the plaintiff's son Pattison Drysdale was indebted to Frederick Piggott the defendant in a sum of 350*l.* 11*s.* 6*d.* for upholstery supplied to the plaintiff's son by the defendant.

After some applications by the defendant's attorney to the plaintiff's son an agreement was come to between the plaintiff and the defendant that some articles of upholstery, in respect of which the demand arose, should be taken back by the defendant on his being allowed 20*l.* per cent on the amount charged by him for the same, in part satisfaction of his claim, and that an insurance should be effected in the name of the defendant * on * 547 the life of the plaintiff's son for the purpose of securing the

¹ See *Lake v. Brutton*, *ante*, 440 and n. (2); 1 Story Eq. Jur. § 638; *Knox v. Turner*, L. R. 9 Eq. 155; S. C. L. R. 5 Ch. Ap. 515; *Norris v. Caledonian Insurance Co.*, L. R. 8 Eq. 127.

balance coming to the defendant in respect of his claim and law expenses, and the amount, if any, which he might (in case of the plaintiff's son making default in payment of the premiums) pay for keeping the policy on foot; and it was further agreed, that the aggregate amount of the balance, law expenses, and 4*l.* 8*s.* as the first year's premium in respect of the assurance, and interest on such aggregate amount at the rate of 5*l.* per cent per annum, should be payable by nine instalments quarterly, except the first instalment, which it was stipulated should be paid in the month of March, 1851, and that a bond should be executed by the plaintiff's son and the plaintiff as his surety for securing the above amount and interest.

The following account was then agreed upon:—

	£	s.	d.	£	s.	d.
Account rendered	355	11	6			
Goods returned	201	2	6			
				154	9	0
Expenses on moving				2	10	0
Life insurance				4	8	0
Interest				0	0	0
Law expenses				9	11	0
				<u>£170</u>	<u>18</u>	<u>0</u>

A bond to secure this amount was at the same time executed by the father and son. It was dated the 10th of February, 1851. It recited that the son was indebted to the defendant in the sum of 170*l.* 18*s.* for goods sold and delivered to the son at the son's request, and also for money paid, laid out, and expended by the defendant for the use and at the request of the son. It then recited that the son, being unable to pay the sum of 170*l.* 18*s.*,

had applied to and requested the defendant to accept
 * 548 * payment of the debt of 170*l.* 18*s.*, with interest thereon at 5*l.* per cent per annum, by the instalments and in manner thereafter mentioned, which the defendant had agreed to do upon having the repayment thereof, with interest as aforesaid, secured by the joint and several bond of the plaintiff's son and of the plaintiff; and that the plaintiff had agreed to join with his son in the bond, subject to the condition thereunder written, as surety for his son. The condition of the bond was expressed to be, that

if the plaintiff's son, his heirs, executors, or administrators, should pay or cause to be paid unto the defendant the full sum of 170*l.* 18*s.*, with interest for the same, on the days and in manner therein mentioned, the bond should be void.

Shortly after the date and execution of the bond the defendant effected an insurance in his own name in the Pelican Life Assurance Company on the life of the son for 200*l.*, subject to the payment of the annual premium of 3*l.* 18*s.* 4*d.*, and the first year's premium was paid by the defendant and was included as above mentioned in the sum secured by the bond.

The son paid the second year's premium.

Neither the plaintiff's son nor the plaintiff paid any further premium, and the third year's premium was paid by the defendant, who applied to the plaintiff and requested him to repay the amount of the premium which the defendant had thus paid in respect of the policy of assurance, but the plaintiff objected to pay the amount, considering, as he stated, that it was the duty of his son, or in case of his not doing so of the defendant, to keep the policy on foot.

The son paid the first seven instalments due upon the bond, amounting together to 140*l.*, and the plaintiff, * as * 549 surety, subsequently paid the last two instalments, amounting to 40*l.* 4*s.* 5*d.* The last payment was made on the 20th of September, 1853.

In January, 1854, the son died intestate, having gone abroad without notice to the insurance office, and having been lost in a steam-vessel which was wrecked off the coast of Ireland, and the plaintiff was his administrator.

The defendant required the Pelican Life Assurance Company to pay him the 200*l.* 197*l.* 18*s.* was accordingly paid to him by the company, a deduction of 2*l.* 2*s.* having been made on account of extra premiums.

The bill prayed that it might be declared that the plaintiff, as surety for his son, was entitled to the benefit of the policy, and was entitled to be paid the sum of 40*l.* 4*s.* 5*d.*, which he so paid to the defendant as aforesaid, and interest thereon at the rate of 5*l.* per cent from the time when he paid the said sum; that the defendant might be accordingly decreed to pay to the plaintiff the sum of 40*l.* 4*s.* 5*d.* and interest, he being willing that the sum of money (if any) which the defendant might have paid in respect of

the premiums of assurance on the policy beyond the amount included in the bond and interest thereon might be retained by the defendant out of the sum received by him on the policy, and that the defendant might be decreed to pay the residue of that sum remaining in his hands to the plaintiff as the personal representative of his son.

Mr. Roundell Palmer and *Mr. Tripp*, in support of the appeal. — The policy belonged in the first instance in equity to the plaintiff's son, as he was charged with the first premium. Nothing took place afterwards to divest the property out of him.
 * 550 The debt for which it was a * security having been paid in full, the defendant is a trustee of the insurance moneys for the plaintiff as his son's representative or as surety, subject to the defendant's lien for the premiums paid by him.

They referred to *West v. Reid*, (a) *Morland v. Isaacs*, (b) *Ex parte Andrews*, (c) *Brown v. Freeman*, (d) *Lea v. Hinton*, (e) *Hart v. Clarke*, (g) *Clack v. Holland*, (h) *Robertson v. St. John*. (i)

Mr. Selwyn and *Mr. Wickens*, for the defendant. — The policy by the agreement was to be for one year only. The defendant, by keeping it on foot afterwards, made it his own. The plaintiff and his son, by declining to pay the premiums, must be taken to have repudiated and abandoned or elected to waive the benefit of it. The son made default in payment of the premiums, and violated the rules of the office by going abroad without notice, so that if the policy had stood in his name it would have been forfeited.

They referred to *Dalby v. India and London Life Assurance Company*, (k) *Gottlieb v. Cranch*. (l)

Mr. Roundell Palmer, in reply.

- | | |
|--|------------------------|
| (a) 2 Hare, 247. | (e) 1 Madd. 573. |
| (b) 20 Beav. 387. | (d) 4 De G. & Sm. 444. |
| (c) 19 Beav. 324; 5 De G., M. & G. 823. | |
| (g) 6 De G., M. & G. 232; S. C., on appeal, 6 H. L. Cas. 663. | |
| (h) 19 Beav. 262. | (k) 15 C. B. 365. |
| (i) 2 Bro. C. C. 140. | |
| (l) 4 De G., M. & G. 440; and see <i>Myers v. United Guarantee Society</i> , 7 De G., M. & G. 112, and <i>Freme v. Brade</i> , 2 De G. & J. 582. | |

THE LORD JUSTICE KNIGHT BRUCE. — In this case Pattison Drysdale had been indebted to the defendant, and his father, the present plaintiff, had * become surety for his son, to * 551 secure the payment of the debt by instalments. As a part of this transaction, a policy had been effected in the name of the creditor on the life of the principal debtor, the expenses of effecting which, or a large part of them, had been charged to the principal debtor, and included in the sum for which his father became surety. It was properly conceded on the part of the defendant that in these circumstances the policy originally belonged to the father and son, or one of them, subject to the right of the creditor to apply the money assured by it in payment of his debt if necessary. Subsequently another premium became due, after a part but not the whole of the debt had been paid, and then upon the creditor applying to the father to pay the premium the father refused to do so, and thereby, so far as he was concerned, exposed the property to total destruction. I will assume in favour of the defendant that this refusal was the refusal of the son as well as of the father. Upon this refusal the creditor might have left the property to destruction; he did not do so, but chose to preserve it, which preservation must enure to the benefit of the father and son. It has been ably argued for the defendant that the refusal to pay the premium was a repudiation of the policy, — a giving up to the creditor of all the equitable title of the father and son to it. I think, however, that the conduct of the parties is not to be treated as having such an effect. If a creditor chooses to preserve a pledge, he preserves it for the benefit of the owners, subject to his lien for the debt and for the expenses incurred in preserving the pledge. The plaintiff therefore is entitled to the money assured by the policy on repaying to the defendant his advances, with interest. There will be no costs at the Rolls or of the appeal, the merits on each side being very small.

* THE LORD JUSTICE TURNER. — The first point made for * 552 the defendant was that the contract was to insure the life only for one year, but the policy produced is one for the whole life of the principal debtor, and the creditor after that cannot be heard to allege that the contract was as he stated. Then what was the position of the creditor? He was mortgagee of a policy, and there was nothing to bar the right of redemption but the fact that the

debtor, when applied to for payment of the premium necessary to keep the policy on foot, refused to pay it. It was quite open to the creditor to proceed to a foreclosure in the regular way, but he has not done so, and in my opinion it would be a most dangerous thing to hold that the mere non-payment by a mortgagor of a charge attributable to the mortgaged property is to have the effect of a foreclosure. The decisions of this court in *Nicholson v. Whalley* (a) and *Hart v. Clarke* (b) are against such a view, and there must in the present case be a decree for the restoration of the moneys received under the policy, after deducting the defendant's advances, with interest at 5*l.* per cent.

THE LORD JUSTICE KNIGHT BRUCE. — I wish it to be fully understood that I adhere to the decisions in *Gottlieb v. Cranch* (c) and *Lea v. Hinton*. (d)

1856. July 21. Before the LORDS JUSTICES.

A bill for partition of a freehold estate stated the death of one tenant in common in fee, having devised her moiety to the defendant's husband, and the death of the other tenant in common intestate, leaving the plaintiff her heir-at-law, but that the defendant's husband, who was an illegitimate son of a deceased brother of the intestate, and claimed to be her heir-at-law, concealing his illegitimacy, had entered upon and enjoyed the entirety, and had settled it by an ante-nuptial settlement, under which the defendant claimed. The bill also sought an account of rents and profits received by the defendant. The defendant by her answer submitted that her settlor was the intestate's heir, but did not claim as a purchaser for value without notice. By the decree a reference was directed to ascertain who was the intestate's heir-at-law, and the result of it was in favour of the plaintiff: *Held*, that a further inquiry, whether the defendant was a purchaser without notice, could not be directed on further consideration.¹

(a) Before the Lords Justices, April 28th, 1855. This case turned on such minute details, that it was not considered useful to report it.

(b) 6 De G., M. & G. 232.

(c) 4 De G., M. & G. 440.

(d) 5 De G. M. & G. 823 [and cases in n. (1)]; and see *Freme v. Brade*, 2 De G. & J. 582.

¹ See 2 Dan. Ch. Fr. (4th Am. ed.) 1366, 1370.

THIS was an appeal from an order of the Master of the Rolls on further consideration in a partition suit, directing an inquiry whether one of the defendants was a purchaser for value without notice, she not having raised the question by her answer or at the original hearing.

The bill was filed by the appellant Edward Lyne, against the respondent Mary Lyne and other defendants.

It stated the will of Edmund Lyne, dated the 26th of June, 1819, devising to his two daughters, Mary Reeve and Elizabeth Lyne, the testator's estate at Great Sherston, in Wiltshire, and directed that his said daughters might have and enjoy the said estate equally between them for ever. And he thereby declared his said daughters to be joint heiresses to his said estate, and that it was to be to their own sole use, with full power of disposal in conjunction with each other as they might think proper, either by will or otherwise. And the will contained an executory devise in favour of Elizabeth Lyne, in the event which did not happen, of the other daughter Mary Reeve dying before her husband William Reeve.

* The bill further stated that the testator died on the 1st * 554 of May, 1827, without having revoked or altered his will, leaving his two daughters and only children and co-heiresses-at-law.

It then stated that Elizabeth Lyne by her will, dated the 27th of May, 1830, gave to her sister Mary Reeve all her freehold and leasehold property whatsoever and wheresoever situate for the term of her natural life, and at the decease of Mary Reeve the testatrix gave and bequeathed all the testatrix's freehold, leasehold, and personal property wheresoever and whatsoever to her nephew Edmund Ormond Lyne, the whole to become his property immediately upon the death of her sister Mary Reeve, who should have no power to alienate any part thereof from him. The testatrix also gave and bequeathed to her nephew Edmund Ormond Lyne all her reversionary right and title under the executory devise above mentioned in and to the moiety of the freehold lands, messuages, and all thereto belonging in the parish of Sherston Magna, which were then held jointly by her sister Mary Reeve and herself.

The bill further stated that William Reeve died in April, 1826, leaving his wife Mary Reeve surviving, and that she died on the 18th of January, 1837, having made a will, which was not executed as the law then required for the purpose of devising freehold

estates, and without lawful issue, leaving the plaintiff her heir-at-law.

The bill then stated that Edmund Ormond Lyne, though called by the testatrix Elizabeth Lyne in her will her nephew, was in fact the illegitimate son of Edward Lyne, a deceased brother of Elizabeth Lyne, and that on Mary Reeve's death Edmund Ormond

* 555 Lyne became entitled * under and by virtue of the will of Elizabeth Lyne to one equal undivided moiety and no more of the real estate of the testator Edmund Lyne, and that the plaintiff as the heir-at-law of Mary Reeve became entitled to the other one equal undivided moiety of such real estate, but that Edmund Ormond Lyne concealed the fact of his illegitimacy from the plaintiff, and on the pretence of his being the legitimate son of Edward Lyne, and as such the heir-at-law of Mary Reeve, entered into possession on the receipt of the rents and profits of the whole of the estate, and in consequence of the plaintiff's then ignorance of his illegitimacy was allowed to continue in such possession or receipt until the time of his death.

The bill then stated that by an indenture dated the 17th of July, 1844, and made between Edmund Ormond Lyne of the first part, the respondent Mary Lyne (then Mary Talmadge, spinster) of the second part, her father William Talmadge, Esquire, of the third part, and the defendants Charles Pritchett Bousfield and John Richardby Bousfield and John Trinder Talmadge of the fourth part (being a settlement made previous to the marriage of Edmund Lyne with Mary Talmadge), the freehold messuages, lands, tenements, hereditaments, and premises of the testator Edmund Lyne were purported to be conveyed by Edmund Ormond Lyne unto Charles Pritchett Bousfield, John Richardby Bousfield, and John Trinder Talmadge, their heirs and assigns, to the use of Edmund Ormond Lyne, his heirs and assigns, until his then intended marriage, and after the solemnization thereof, to the uses and upon the trust that the said trustees and the survivors and survivor of them, their, or his executors, administrators, and assigns should stand seised of and interested in the hereditaments and prem-

* 556 ises thereby purported to be granted and released * upon trust to pay the rents, issues, and profits, dividends, interest, and annual produce thereof to Edmund Ormond Lyne for his life, and on his decease upon trust to pay the same to the respondent Mary Lyne for her life, and from and after their respective deaths

to stand seised, possessed of, and interested in the trust estates and the rents, issues, and profits and annual produce thereof upon the trusts therein mentioned, being trusts for the benefit of the issue of the marriage, with remainders over.

The bill stated that the marriage between Edmund Ormond Lyne and Mary Talmadge was duly solemnized shortly after the date of the settlement, and that there was no issue of it.

The bill stated the will of Edmund Ormond Lyne and his death on the 15th of March, 1851, and subsequent devolutions of title under the settlement, and that on the decease of Edmund Ormond Lyne the respondent Mary Lyne and the other defendants, claiming under Edmund Ormond Lyne, or some one of them, entered into and had ever since continued and were or was then in possession or the receipt of the rents and profits of the whole of the real estate, although they were entitled to the possession or receipt of the rents and profits of only one undivided moiety thereof.

The bill further alleged that the plaintiff did not discover the fact of the illegitimacy of Edmund Ormond Lyne until after his death in the month of March, 1851; but having then discovered, as the fact was, that Edmund Ormond Lyne was illegitimate, the plaintiff frequently, by himself and his agents, applied to the several last-named defendants, and requested them to account for and pay over to him the moneys due to him in respect * of * 557 the rents and profits of his one equal half part or share of and in the real estate, and to make and come to a fair and equal partition of the real estate, but that the defendants refused to comply with such requests.

The prayer was that the parts and shares jointly belonging to the plaintiff and all other parties thereinbefore named of and in the hereditaments and premises might be ascertained, that a fair partition might be made of the hereditaments and premises into two equal parts or moieties, and that a commission of partition might issue for that purpose, with the usual directions.

The respondent Mary Lyne, in her answer, submitted that Edmund Ormond Lyne, on the decease of Mary Reeve, became entitled not only under and by virtue of the will of Elizabeth Lyne to one equal undivided moiety of the real estate, but also as heir of Mary Reeve to the other moiety thereof. She admitted the settlement on Edmund Ormond Lyne's marriage, but did not set

up the defence that she was a purchaser for valuable consideration without notice.

At the hearing in July, 1855, an inquiry was directed as to who was the heir-at-law of Mary Reeve at her death. By the certificate made in pursuance of the decree it was certified that the plaintiff was her heir. Upon the case coming on for further consideration, the defendant Mary Lyne insisted that under the marriage settlement she was a purchaser for valuable consideration without notice.

By the order under appeal, dated the 15th of March, 1856, it was ordered that the following inquiry should be made, that * 558 is to say, an inquiry whether at the date * of the indenture of settlement of the 17th of July, 1844, the defendant, Mary Lyne, had notice that Edmund Ormond Lyne, took the property in question, or any part thereof, as heir-at-law of Mary Reeve, and also that Edmund Ormond Lyne was illegitimate, and further consideration was adjourned.

The case is reported below in Mr. Beavan's Reports. (a)

Mr. Follett and Mr. W. W. Cooper, in support of the appeal. — The question which is the subject of the reference was not reserved by the decree at the hearing, nor in fact raised by the answer. The defence of a purchase for value without notice must be distinctly set up by plea or answer, or at all events now by affidavit, and in this case, as the estates are all legal, the subject of the inquiry is in fact immaterial.

They referred to Mitford on Pleading, (b) *Aston v. Curzon*, (c) *Hardy v. Reeves*, (d) *Collins v. Archer*, (e) *Lamb v. Williams*, (g) *Burlase v. Cook*, (h) *Jerrard v. Saunders*, (i) *Attorney-General v. Wilkins*, (k) *Colyer v. Finch*. (l)

[Their Lordships desired the counsel for the respondents to address their arguments in the first instance to the question,

(a) Vol. 21, p. 318.

(b) Page 275 (4th ed.).

(c) 3 P. Wms. 244, note.

(d) 5 Ves. 426.

(e) 1 Russ. & Myl. 284.

(g) Bro. C. C. 264.

(h) Freem. 25.

(i) 2 Ves. Jr. 187-454.

(k) 17 Beav. 285.

(l) 19 Beav. 500; 5 H. L. Cas. 905.

whether an inquiry such as that which was the subject of appeal could be directed on further consideration, without any reservation having been made * in the original decree, and * 559 without the question being raised by the pleadings.]

Mr. Lloyd and *Mr. Woodroffe*, for the respondent. — The question is sufficiently raised by the pleadings. The bill itself states the settlement. Edmund Ormond Lyne was considered to be legitimate until shortly before the institution of the suit. As to there being no reservation in the decree, such a reservation was not requisite. It would have been premature to direct an inquiry as to purchase for value until the question of legitimacy was decided.

Mr. Graham Hastings, for other defendants.

Their Lordships, without calling for a reply, were of opinion that the new inquiry could not be properly directed on further consideration, and made an order discharging that made at the Rolls, and directing a partition and an account of rents and profits for six years before the filing of the bill against the estate of Edmund Ormond Lyne and against Mary Lyne, with the usual direction to take the account of Edmund Ormond Lyne's estate, if assets were not admitted, and reserving further consideration.

1856. July 23. Before the LORDS JUSTICES.

The discharge of an insolvent under the 1 & 2 Vict. c. 110, extends to a breach of trust, although the amount due in respect of it may not be ascertained, except by a decree made subsequently to the discharge. Where, therefore, a *cestui que trust* instituted a suit in respect of a breach of trust against a solvent trustee, and one who had been discharged under the above Act: *Held*, that the decree had properly been only made for payment against the former, with leave to prove under the insolvency of the latter.¹

¹ See *Lewin Trusts* (5th Eng. ed.) 658.

THIS was an appeal from a decree of the Master of the Rolls directing one of the defendants to pay a sum in respect of a breach of trust, and proof to be made under the insolvency of the other.

In 1842 a sum of 7000*l.* was secured to be paid to two trustees named William Lake and John Hayward, and the trusts of the money were, as to the income for John Finch for his life, and as to 1000*l.*, part of the capital, in trust after his decease for Mary, one of his daughters, the wife of William Thompson.

This sum of 1000*l.* had been by a settlement assigned, subject to the life-interest of John Finch, to James Thompson and Edward Finch, upon trust to receive the same and invest it in their names upon real or government securities, and pay the dividends to Mrs. William Thompson for life, then to her husband for life, and after their decease to hold the capital in trust for their children absolutely. The settlement contained a power to change the securities into any other real or government securities with the consent of the husband and wife, or of the survivor, and it also contained a power for the appointment of new trustees.

William Thompson, the husband, died in 1828, leaving children. James Thompson, the trustee, died in 1838, and John Hayward, one of the defendants, having been appointed a trustee in his place, the trust fund was assigned to Edward Finch and John Hayward.

* 561 * In 1842 John Finch the tenant for life died. Soon afterwards William Lake and John Hayward paid the 1000*l.* to Edward Finch and John Hayward, and by a deed of release dated the 17th of May, 1842, the two latter admitted the receipt of the money and released William Lake from all demands in respect of it. At the same time William Lake and John Hayward, who were executors of the will of John Finch, raised 500*l.* by sale of some stock belonging to their testator for the purpose of investing the same according to the trusts of that will, in trust for Mrs. Thompson for life, and after her decease for her children.

John Hayward, who was a solicitor at Dartford, instead of investing these sums of 1000*l.* and 500*l.* as directed by the settlement and the will, advanced them, with other moneys, in his own name to a client of his, and they could not be recovered. Up to the year 1849 John Hayward paid Mrs. Thompson interest at 5*l.* per cent per annum upon the 1500*l.*, but afterwards he paid her

only 3l. per cent, which she consented to receive upon his representation that his client did not pay the interest on the mortgage.

In 1852 John Hayward was discharged under the 1 & 2 Vict. c. 110, and inserted in his schedule a sum of 1500l. as due to Edward Finch as a trustee for Mrs. Mary Thompson. Creditors' assignees had been appointed under the insolvency, but no dividend had been declared.

Afterwards the present suit was instituted by Mrs. Thompson, against Edward Finch and John Hayward, and her children, and the bill prayed that the defendants Finch and Hayward might be decreed to replace the 1000l. The assignees of Hayward were not made parties.

* The defendant Finch by his answer stated that the sum * 562 of 1000l. was raised by Hayward and his co-trustee Lake, and was retained by Hayward without the defendant's knowledge or privity, and without any previous communication with him, but (as Hayward subsequently stated) with the consent of the plaintiff, and with a view to its investment on real securities. He further stated, that if he had in fact joined in the release it was at the request of Hayward and for the sake of conformity, and not by reason of the sum of 1000l. or any part thereof having come into his hands or under his control; that Hayward shortly afterwards informed him that he had duly invested the 1000l. at the request and to the satisfaction of the plaintiff upon a sufficient mortgage; and that the defendant Finch had not interfered or acted, nor been requested by the plaintiff or the other *cestuis que trust* to interfere or act in the trusts of the 1000l. As to the 500l. similar facts were stated. He stated that he had fully believed the representation of Hayward with reference to the investment of the sums of 1000l. and 500l., and never doubted until the insolvency but that the trust moneys had been duly invested by Hayward pursuant to the trusts of the settlement.

By the decree under appeal it was declared that the defendant Finch was liable to replace the 1000l. and the 500l., and he was ordered to pay those sums accordingly into Court, with liberty to him to go in under the insolvency of Hayward to prove, but no decree was made against the latter.

The case is reported in the 22d volume of Mr. Beavan's Reports. (a)

* 568 * *Mr. Roundell Palmer* and *Mr. Shebbeare*, for the plaintiff, supported the decree.

Mr. Bagshawe and *Mr. Southgate*, for the children, the defendants, in the same interest.

Mr. Follett and *Mr. Osborne*, for the defendant Finch. — *Mr. Finch* only acted by joining in the receipt for the sake of conformity, and did not otherwise interfere in the execution of the trusts. He is, therefore, not liable for the acts of *Hayward*. At all events the decree must be varied, by being made against *Hayward* as well as *Finch*, as regards payment of the trust money. The debt was not due until the decree had been pronounced, which was after the discharge, and the debt was consequently not affected by it.

They referred to *Brice v. Stokes*, (a) *Buckeridge v. Glasse*, (b) *Hawker v. Hallewell*. (c)

THE LORD JUSTICE KNIGHT BRUCE. — The trust in question was clearly accepted by *Mr. Finch* before the month of May, 1842. Under that trust it was his duty, together with his co-trustee for the time being, who at that period was *Mr. Hayward*, to invest the money subject to the settlement, according to the terms of the settlement, when received. In the month of May, 1842, it must be taken that *Mr. Finch* was personally and perfectly aware that the money had been received by *Mr. Hayward*. It then became his duty to see promptly, that is to say, with all due despatch * 564 * to the money being invested in their joint names in conformity with the trusts of the settlement.¹ Unhappily no such thing was done, and either from the beginning, or for the first time after a reasonable period for investing the money had elapsed, *Mr. Finch* became equitably indebted for the money; nor is it suggested that until the year 1848 (as I understand) *Mrs. Thompson* had any information whatever upon the subject which could have induced her to suspect that there was any thing wrong. In point of fact, what *Mrs. Thompson*, and *Mr. Finch* also, must be

(a) 11 Ves. 324.

(b) Cr. & Ph. 126.

(c) *Ante*, 318.

¹ See *Lewin Trusts* (5th Eng. ed.), 205, 218; *Perry Trusts*, § 402; 3 *Lead. Cas. in Eq.* (3d Am. ed.) 457, 458, 468 *et seq.*

taken to have understood was, that the money had been invested on a proper mortgage in the joint names of the trustees, and appropriated to the purpose of the trust, until the contrary was stated. That probably is what they had both a right to believe, but unfortunately it was Mr. Finch's duty to ascertain whether the facts were as he may be taken to have understood them to be.¹ In truth the facts were not so. There was no mortgage at all, or no proper mortgage, and if there had been a mortgage proper in any sense (which there was not) it was an improper proceeding, because it was not in the names of the two trustees. Then with regard to what took place in 1849 and 1850, a debt having completely arisen, and been completely known, it is idle to say that this lady had at any time a full knowledge of her rights, or has made her case worse by not proceeding instantly against Mr. Finch, or by taking less interest, for a time at least, than she was entitled to. A creditor does not lose the unpaid portion of his debt by taking part of it. Before a part can go in discharge of the whole there must (in the absence at least of a deed or record) be a consideration for such a discharge. There was no consideration here. Nothing has taken place, in my judgment, to remove the liability under which Mr. Finch unfortunately was placed through his confidence in Mr. Hayward. The *decree *565 therefore, I am concerned to say, in my judgment is right. I do not see what other course the Master of the Rolls could have taken. It is said that Mr. Hayward should have been associated in the liability declared by the decree; it appears to me not so, because it is admitted that he has been discharged under the Insolvent Act, and it is plain that he was so discharged certainly as to this debt, though its existence had not been judicially declared. The decree does all that could have been done in such a state of things: it gives a right to go in under the insolvency against the estate. But the matter cannot be allowed to rest here. The Court has a serious duty to discharge to society. In my judgment it would be inconsistent with that duty if we were not to make an order that at a time now to be fixed — probably not before November next — Mr. Hayward should, upon the materials appearing before the Court in this cause, and in the causes of *Finch v. Shaw* and *Colyer v. Finch*, show cause why he should not be struck off

¹ See Lewin Trusts (5th Eng. ed.), 216, 661, 662.

the rolls as a solicitor of this Court. If my learned brother shall concur in that, the business will be transacted as usual in such cases by Mr. Johnson.

THE LORD JUSTICE TURNER.—This gentleman having unfortunately executed the settlement of 1818, must undoubtedly be taken to have accepted the trusts of that settlement, and there is a liability attaching upon him, whether we consider the money to have remained in the hands of Hayward alone, or whether those moneys had not in fact been received, for, immediately on the death of Finch in 1842, it became his duty to recover those moneys and place them in proper state of investment, in the names of himself and his co-trustee, upon the trusts of the settlement. There was clearly, therefore, an original liability
* 566 attaching upon * him. The argument on the part of the appellant in the present case is, that the plaintiff Mrs. Thompson had in truth concurred in putting the money into the hands of Mr. Hayward, or at all events had allowed it to remain in his hands, and therefore has absolved Finch from the liability which had attached upon him. I think the answer to that argument is this, that she must be taken to have put the money into the hands of Hayward for the purposes of the trust, one of which was the investment of the money on proper security, in the joint names of Hayward and Finch, and that Mr. Finch cannot therefore be absolved by the fact of her having allowed the fund to be received by Hayward; he must be taken to have known that the money was in Hayward's hands, and it became his duty to take care that the moneys were invested according to the trust. There is nothing further that occurs till 1848 or 1850. I cannot see that this lady has done more than get what she could out of the wreck of this property. I do not think that in what she has done in that respect she can be held to have absolved Mr. Finch from the liability that originally attached. If she had done any thing to alter the rights of Mr. Finch as against Hayward, that might or might not have operated to have absolved Mr. Finch, but it is clear nothing of the sort has been done. It is said the decree ought to have gone against both Finch and Hayward, and the case of *Buckeridge v. Glassey* is cited. I confess that case took me at first by surprise, but on looking at it it is intelligible enough, the trust in that case never attached on the moneys until the decree of

the Court was made. The moneys had been lent to trustees as the husband's own moneys. It was only by the right of the *cestui que trust* to follow those moneys into the hands of the trustee by virtue of the decree of the Court, which was subsequent to the insolvency, the trust attached — that circumstance distinguishes that case from * this — here, there having been an * 567 insolvency, under which the debt due was scheduled as a debt due at the time, I am afraid it is impossible to make a decree to render Hayward jointly liable with Finch. I concur strongly in the view my learned brother has taken of the liability of Hayward. In another point of view I think it is the duty of the Court to call upon this gentleman to answer the matters which appear in this suit and in the affidavits, and to have it considered whether he is a proper person to remain on the rolls of the Court.

GALLEMORE v. GILL.

1856. July 23. Before the LORDS JUSTICES.

Real and personal estates were given by will upon trust as to the real estates, to pay such of the testatrix's debts, funeral and testamentary expenses as her personal estate was insufficient to satisfy, and subject thereto in trust as to all the residuary real and personal estate for the testatrix's grandchildren. By a codicil the testatrix directed her trustees acting under her will to pay certain legacies: *Held*, that these legacies were charged on the real estate, although given to legatees in addition to legacies which by the will were directed to be paid out of the personal estate.¹

THIS was an appeal by the residuary devisees of Jane Gill the testatrix in the cause, from a decision of Vice-Chancellor STUART, reported in the 2d volume of Messrs. Smale and Giffard's Reports, (a) holding that a legacy and an annuity given by a codicil were charged on the testatrix's real estate.

The testatrix, Jane Gill, by her will dated the 8th of January, 1845, gave all her wearing apparel and ornaments to her niece Sarah Gill absolutely; she then gave and bequeathed furniture

(a) Page 158.

¹ See 2 Jarman Wills (3d Eng. ed.), 565-568.

and other specified property to her nephews Joseph Gill and George Southam, upon trust to have an inventory made of the same, and to permit her niece Sarah Gill to use the same during her life if she remained unmarried, and on her death or

* 568 * marriage upon trust to stand possessed of the same in trust for such person as she should appoint; and the testatrix

gave all her freehold and real property, messuages, lands, tenements, and hereditaments, and all moneys in her possession, and due, and owing to her, either from her tenants or other persons, at the time of her decease, and all other the personal estate of or to which she or any person or persons in trust for her, was or were at the time of her decease, or should or might be seised, possessed, or entitled in possession, reversion, remainder, or expectancy, or of which she had power to dispose by that her will, with their appurtenances, either under or by virtue of any power for that purpose given or reserved to her or otherwise howsoever (except the said furniture and effects, and any other estate and effects which she might otherwise dispose of by that her will or any codicil thereto) to trustees, their heirs, executors, administrators, and assigns, upon trust that they and the survivor of them, his heirs, executors, administrators, and assigns, should, as soon as conveniently might be after her decease, collect and get in all money due or owing, and reduce the whole of her personal estate into ready money, and out of such money pay and discharge all her just debts, funeral and testamentary expenses, and a legacy of 10*l*. to her servant Mary Harburn, and to stand possessed of the residue of such money, if any, and should be seised of all the said real and leasehold property, messuages, lands, tenements, and hereditaments upon the trusts and for the intents and purposes, and subject to the powers, provisos, and declarations thereafter expressed, that was to say, upon trust that her said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, should, out of the rents, issues, and profits of the said real and leasehold estate, in the first place pay and discharge such of the said debts or funeral and testamentary expenses as

* 569 her said personalty should be * insufficient to satisfy and discharge, and subject thereto should be seised and possessed of the entire residue of her estate or effects in trust for her three grandchildren who should attain twenty-one.

By a codicil dated the 1st of June, 1847, the testatrix gave as

follows: "I, the above-named Jane Gillett, declare this to be a codicil to the above-written will. I direct that the trustees or trustee acting under such will shall pay to my servant Mary Harburn 40*l.* in addition to the legacy of 10*l.* above mentioned; and also during the life of my niece Sarah Gill, in addition to the bequest above mentioned, shall pay to her an annuity of 100*l.* on the 25th of March, 24th of June, 29th of September, and 25th of December in every year."

The testatrix died on the 8th of July, 1847, and by the certificate of the chief clerk he had disallowed to the trustees and executors the legacies and annuities which they had paid, on the ground that they were not charged on the real estate, and that the personal estate was insufficient to pay the testatrix's debts. On the trustees moving to vary the certificate, the Vice-Chancellor, by the order under appeal, held that the payments ought to have been allowed, and the residuary devisees and legatees appealed.

Mr. Bacon and *Mr. Faber*, for the appellants.—The legacies and annuities given by the codicil being given in addition to the legacies given by the will to the same legatees must come out of the same fund.

They referred to *Leacroft v. Maynard*, (a) *Crowder* * v. * 570 *Clowes*, (b) *Day v. Croft*, (c) *Warwick v. Hawkins*, (d) *Symons v. James*. (e)

Mr. Wigram and *Mr. Little*, for the annuitant Sarah Gill, and

Mr. Malins and *Mr. Dickinson*, for the executors, were not called upon.

THE LORD JUSTICE TURNER.—We entertain no doubt on this question. The testatrix, by her codicil, directs as follows: "I direct that the trustees or trustee acting under such will shall pay to my servant Mary Harburn 40*l.* in addition to the legacy of 10*l.* above mentioned; and also during the life of my niece Sarah Gill, in addition to the bequests above mentioned, shall pay to her an

(a) 1 Ves. Jr. 279.

(d) 5 De G. & S. 481.

(b) 2 Ves. Jr. 449.

(e) 2 Y. & C. C. C. 301.

(c) 4 Beav. 561.

annuity of 100*l.* on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in every year." It is necessary therefore to revert to the will to see how and from what source the trustees were to make these payments. The will vested in the trustees the residue of the personal estate and the whole of the freehold and leasehold estates, and the presumption is that it was out of the funds thus vested in the trustees that the payments directed by the codicil were to be made; *prima facie*, therefore, they must be considered as charged upon the real estate.

But it was argued that a contrary intention was manifested so as to defeat this presumption, because by the will the testatrix gave to the legatee 10*l.*, which was * made payable out of the personal estate only, and to the annuitant some other interests, which were to be satisfied out of the personal estate only, and that the gifts by the codicil being expressly additional to the former must be paid out of the same funds. No doubt, as a general rule, a legacy given by a codicil is held subject to the same contingencies, and payable out of the same funds as a legacy to the same person given by the original will. But the codicil may not only add to the legacy, but also extend the fund out of which it is to be paid; and in this will and codicil I think there is no doubt that that is the case. The codicil contains a direction that the trustees shall pay the legacy, and the testatrix by her will has blended real and personal funds in the hands of the trustees for the payment.

The appeal must therefore be dismissed, with costs.

The Lord Justice KNIGHT BRUCE concurred.

When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such pos-

session should be continually visible or actively asserted. Where therefore the purchasers of mines took possession under the agreement for purchase without any conveyance: *Held*, that a subsequent purchaser of the land without any exception of mines took with notice of the agreement, and was bound specifically to perform it.¹

THIS was an appeal of the defendant from a decree of Vice-Chancellor STUART, declaring the plaintiffs entitled, as against the appellant, to a specific performance of an agreement for the purchase of mines at Bradford in Yorkshire, and restraining the appellant from proceeding at law to recover damages by reason of the plaintiffs getting coal from the mines.

The agreement was dated the 26th of August, 1823, and was made between Richard Dawson of the one part and Benjamin Kaye and John Wilkinson Balme of the other part, and thereby Richard Dawson agreed to sell and Benjamin Kaye and John W. Balme agreed to purchase for 2000*l.* as tenants in common the mines, veins, and seams of coal under the several closes of land described in the agreement in Allerton in the parish of Bradford, commonly called Crossley Hall estate, with liberty to sink pits, drive drifts, levels, and watercourses, and to get, win, work and raise and dispose of the coals; and also to erect such building or buildings and to put up such as might be requisite for the working the mines. And Benjamin Kaye and John W. Balme thereby agreed to pay unto Richard Dawson his heirs and assigns 2000*l.* by yearly instalments, at the respective times and in manner thereafter mentioned.

Soon after entering into this agreement, Mr. Kaye died, and on the 8th of November, 1841, his executors, Thomas Kaye and Edward Townend, agreed to purchase Mr. Balme's interest under the agreement. They subsequently * sold all their * 573 interest under the agreements to John Bland and William Collingham, who afterwards sold the benefit of the agreements to the plaintiff John Holmes. John Holmes took William Collingham and others into partnership, and they instituted this suit for a specific performance of the agreement of August 26, 1823.

The 4th, 9th, 10th, 11th, and 14th paragraphs of the bill stated to the following effect:—

¹ See *Penny v. Watts*, 1 Mac. & G. 164, and note (2) and cases; 2 *Sugden V. & P.* (7th Am. ed.) [1052], 558 and note (2); 1 *Dart V. & P.* (4th Eng. ed.) 416, 2 *ib.* 791, 912, 913.

4. The said Benjamin Kaye and John W. Balme entered into possession of the mines, seams, and veins of coals so agreed to be sold to them immediately after the execution of the agreement, and continued to work and win coal therefrom until the death of the said Benjamin Kaye in the year 1836. The purchase-money mentioned in the said agreement was duly paid by them to the said Richard Dawson.

9. The said Thomas Kaye and Edward Townend continued to work and win the coal from the mines, veins, and seams mentioned in the said agreement from the date thereof until the month of August, 1850. By an agreement dated the 1st of August, 1850, and made and executed between and by the said Thomas Kaye and Edward Townend of the one part and John Bland and the plaintiff William Collingham of the other part, the said Thomas Kaye and Edward Townend agreed to sell to the said John Bland and William Collingham, who agreed to purchase the coal belonging to the said Thomas Kaye and Edward Townend, and held by them under leases from the Misses Dawson and Mr. Fawcett, and lying in the township of Allerlon-cum-Wilsden, at or for the sum of 50*l.* payable as therein mentioned, but subject, nevertheless, to the conditions and restrictions mentioned in the said leases

* 574 or under which the said vendors then * held the said coal.

On this agreement a receipt for the 50*l.* as purchase-money is indorsed dated the 24th day of April, 1854.

The 10th paragraph stated that the coal described as held under leases from Misses Dawson and Mr. Fawcett was so described by mistake, and was the coal in question.

The 11th paragraph stated that John Bland and the plaintiff William Collingham got coal from the mines mentioned in the agreement, by themselves and in partnership with the plaintiff John Holmes continually from the date of the said agreement until some time in the year 1853; and that by an agreement in writing made between John Bland and the plaintiff William Collingham of the one part, and the plaintiff John Holmes of the other part, dated the 24th of April, 1854, John Bland and William Collingham, in consideration of 55*l.* to be paid to them as therein mentioned, agreed to sell to John Holmes, who agreed to purchase of John Bland and William Collingham the coal lying under the above-mentioned lands held by John Bland and William Collingham under the agreement of the 1st day of August, 1850, subject,

nevertheless, to the stipulations contained in a certain agreement dated the 13th of February, 1823, and in the agreements of the 26th of August, 1823, and the 8th of November, 1841, and that the purchase-money mentioned in the agreement of April 24th, 1854, had been duly paid.

The 14th paragraph stated that the plaintiffs had continued to work and win coal from the mines, veins, and seams comprised in the said agreement since they respectively purchased the same down to the present time.

The bill further alleged that in December, 1854, *Holmes *575 and the other plaintiffs entered into partnership for the purpose of working the coal which had been so bought by Holmes. That in January, 1851, Mr. Powell, the defendant, purchased the Crossley Hall estate from parties entitled under Richard Dawson, and that in December, 1855, he commenced actions against the plaintiffs to recover damages from them for working the coal. The bill charged that Mr. Powell knew before he purchased the estates that the coal had been sold and was being worked by persons who claimed to be entitled to it; that no one could have walked over the estate without seeing the workings; and that the plaintiffs had constantly, since they had been in possession of the mines, paid to the tenants of the Crossley Hall estate compensation for surface damage, the last payment being made at Christmas, 1855. The prayer was for an injunction to restrain the defendant from continuing the actions, and to have a conveyance from him of the coal comprised in the agreement, and that he might pay the costs.

The appellant rested his defence to the suit on the following grounds: 1st. That the mining operations conducted by Kaye and Townend on the estate ceased in 1848 or 1849, and that the surface of the land having been restored to agriculture, they must be considered to have abandoned their right under the agreement of 26th August, 1823. 2d. That the solicitor for Miss Dawson (who sold the estate to the appellant) and the auctioneer purposely concealed from the appellant the existence of the agreement of 26th August, 1823, that the abstract of title furnished to him contained no allusion to it, that his solicitor did not discover it or search the register of the riding, and that the mines and minerals on the estate were expressly included in the conveyance to the appel-

lant. 3d. That in September, 1850, when he viewed the
 * 576 * estate and the sale to him took place, there were no
 mining operations in progress and no traces of old workings
 on the land perceptible to an ordinary observer; that the earliest
 period at which the works were resumed was the autumn of 1851;
 nine months after the conveyance to him; and that he had no
 notice of the plaintiffs' claim till the end of 1854. And 4th. That
 the plaintiffs had worked and were working the coal in an improper
 manner and so as to damage the surface unnecessarily.

The evidence was conflicting, the plaintiffs' witnesses deposing
 that in August, September, and October, 1850, there were open
 mines on the estate, particularly in a field called the High Dark
 Wood, and that the pit-hills and machinery were so conspicuous
 that no one walking over or even near to the estate could help see-
 ing them; and the defendant's witnesses swearing positively that
 although there were in August and September, 1850, open pits on
 an adjoining portion of the Crossley Hall estate which belonged to
 Mr. Balme, there was no pit at that time in the High Dark Wood,
 or in any part of the portion of the Crossley Hall estate belonging
 to the defendant.

Mr. Malins and Mr. J. Pearson, for the plaintiffs.

Mr. Craig and Mr. T. C. Wright, for the appellant.

Ware v. Lord Egmont, (a) Jones v. Smith, (b) Bernhardt v. Greenshields, (c) and Ex parte Stevens, (d) were referred to.

The nature of the arguments and the other authorities cited
 appear sufficiently from the judgments.

Judgment reserved.

July 25.

* 577 * THE LORD JUSTICE KNIGHT BRUCE. — This appeal is
 against a decree for specific performance of a written agree-
 ment signed by the parties to it, into which they entered in the
 year 1823; it was in these terms: [His Lordship read it.]

(a) 4 De G., M. & G. 473.

(c) 9 Moore, 18.

(b) 1 Phill. 244.

(d) 4 Deac. & Ch. 117.

Mr. Dawson is dead. His rights and interests are represented by the defendant, who acquired his title by purchase for valuable consideration from Mr. Dawson's daughter, a purchase completed in and not before the year 1851. The rights and interest of Kaye and Balme are represented by the plaintiffs, who claim under Edward Townend and Thomas Kaye, which Edward Townend and Thomas Kaye became in or before the year 1836 the executors of Benjamin Kaye, and purchased John W. Balme's interest in the year 1841, and considering the terms and nature of the agreement of 1823, the consideration paid for it by Benjamin Kaye and John W. Balme, and the extent to which long before and in and after the year 1847 the agreement was certainly acted upon, considering also that neither against the plaintiffs nor against any of those whom they represent in title has any case of fraud or laches or of lying by been in my opinion established, I think it very clear that the decree is right, unless the defendant, who has the legal fee, can maintain what he asserts, that he purchased the estate affected by the agreement without notice of it. This in truth seems to me to be, if not in every sense, the only question in the cause, at least substantially so.

The bill at the conclusion of the 15th paragraph says: "The defendant knew before he purchased the estates the coal under it had been sold to the said Edward Townend and Thomas Kaye, and was being worked by persons who claimed to be entitled under them. No * person could have walked over the said * 578 estate without seeing that such mines were being worked."

This allegation or these allegations the defendant, however, denies to be true. But the defendant having necessarily averred total want of notice has put that generally in issue, and evidence of notice is, I apprehend, not improper evidence in the cause, though, of notice, not within the specific allegations of the bill, which, however, does allege that the agreements of 1823 and 1841 were registered at Wakefield. And in fact they were so registered, one in 1826, the other in 1841. Whether their registration was not or was required or authorized, still registered they were; and evidence, that previously to the completion of the defendant's purchase, the register at Wakefield was searched on his behalf, as to a period comprising both or either of the years 1826 and 1841, is, I apprehend, legitimate evidence in the suit.

The abstract of title delivered by the vendor's solicitor to the

solicitor of the defendant on the occasion of his purchase has been produced. It comes out of his possession and is in evidence. It contains two opinions of his able counsel Mr. Wright on the title, and in the latter of those opinions, which is dated the 18th January, 1851, Mr. Wright says: "The usual searches should be made against Richard Dawson, Mary Long Dawson, and Elizabeth Hutton Dawson before completing the purchase." It is therefore particularly probable that the solicitor concerned for the defendant in the matter of the purchase did not so grossly neglect his plain and obvious duty as to omit searching the Wakefield register before the completion of the purchase. It is not proved or attempted to be proved that the search was not made, nor has the

solicitor who was concerned (Mr. Darlington) made an affidavit or been examined, though examinable * as a witness.

* 579 On the whole it strikes me to be a just inference from the materials before the Court, that the Wakefield register was searched on behalf of the defendant before completing his purchase, searched back as far at least as the commencement of the year 1823, and that he in that way had notice of the plaintiff's title before the completion. The frame, however, of the bill is such that probably, without giving the parties respectively an opportunity of adducing further evidence, it would not be right to decide whether the Wakefield register was searched.

But I do not think it of importance whether the defendant, before completing his purchase, had in that shape or in any shape, otherwise than as I shall mention, notice or not. For, in my opinion, those claiming under Benjamin Kaye and John W. Balme were under the agreement of August, 1823, in possession before and at the time when the defendant purchased the hereditaments which, by that agreement, it was contracted to grant to them. By "possession" I mean "occupation," direct occupation, not receipt of rent. The bill contains these averments: [His Lordship read paragraphs 4, 9, 11, and 14, set out above.]

Now the subject of these allegations was, of course, the hereditaments agreed to be granted in August, 1823, which hereditaments were corporeal, or included corporeal hereditaments, it being clear that Benjamin Kaye and John W. Balme took under the contract of 1823 an equitable right to more than a mere license. Under this agreement Benjamin Kaye and John W. Balme, and those claiming title under them, were in fact long before and in and

after the year 1847 working in the land or parts of the land which the instrument affected. That is clear and undisputed. And there was thus, in my * opinion, possession under the * 580 agreement of all that it purported to contract to grant.

Was that possession abandoned? I think that it was not. The mere suspension of works, the mere act of ceasing for a time to work would not amount to abandonment. There was, in my judgment, no intention to abandon, no "*constitutio nolle possidere*," no "*animus non possidendi*," and the possession that I have mentioned consequently continued *animo et facto* as I think down to the time and at and after the time of the defendant's purchase. And here I may add, that amongst such witnesses in the cause as I consider trustworthy are John Bland, John Pearson, James Booth, Jeremiah Walton, and Thomas Kaye, five deponents, who, if they speak substantially the truth, are sufficient with the undisputed facts (though I do not say necessary) to establish the plaintiff's case.

I apprehend that by the law of England when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows or cannot be heard to deny that he knows another to be in the possession of a certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is and claims to be in that possession. Lord ELDON's language in *Allen v. Anthony*, (a) where he * says: "It is so far settled as not to be disputed, that a * 581 person purchasing where there is a tenant in possession, if he neglects to inquire into the title, must take, subject to such rights as the tenant may have," recognizes, as I understand it, both rules. But possession of a corporeal hereditament to be effectual need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without

(a) 1 Mer. 282-284.

authorizing any servant or agent or other person to enter upon it or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may, nevertheless, still continue, at least, unless his conduct afford evidence of intentional abandonment, which such conduct, as I have mentioned, would not necessarily do. Suppose, for example, a purchase of a tract of woodland, and the purchaser after possession given him to leave it wholly neglected, uninhabited, untouched, unvisited, unseen, for years, the possession is not thus lost. And the purchaser not having intended abandonment, and there being nothing more in the case, if two other persons deal together for an interest in the property, neither will be able to say effectually, however truly, that he was not aware of the possession of the first, at least to say so as against him.

I think that the decree does no injustice to the defendant, and this for more, perhaps, than one reason, but especially, because in my judgment before and at the time when he made the purchase by which, as he contends, the plaintiffs are excluded, they or those under whom they claim were rightfully in the possession of the property in question. It is unnecessary for me to repeat that I have uniformly been using the word "possession" as meaning "occupation" and not as including that kind * of possession, of a corporeal hereditament, which a man has by receiving compensation or remuneration for the occupation of it by another.

I may add that among the authorities which I have on this occasion not forgotten are: *Hardy v. Reeves*, (a) *Gordon v. Gordon*, (b) *Taylor v. Stibbert*, (c) *Daniels v. Davison*, (d) *Doe v. Wood*, (e) *Jones v. Reynolds*, (g) *Taylor v. Parry*, (h) *Humphries v. Brogden*, (i) *Norway v. Rowe*, (k) *Doe v. Alderson*, (l) *Miles v. Langley*, (m) *White v. Wakefield*, (n) and *Oxwith v. Plummer*. (o)

The appeal should, in my opinion, be dismissed with costs.

(a) 5 Ves. 426.

(b) 3 Swanst. 400.

(c) 2 Ves. Jr. 437.

(d) 16 Ves. 249.

(e) 2 B. & A. 724.

(g) 4 A. & E. 805.

(h) 1 Man. & Gr. 604.

(i) 12 Q. B. 739.

(k) 19 Ves. 144.

(l) 1 M. & W. 210.

(m) 1 Russ. & Myl. 39.

(n) 7 Sim. 401.

(o) 2 Vern. 636.

THE LORD JUSTICE TURNER. — My learned brother has gone so fully into this case that I have but a few words to add. It was argued on the part of the defendant that the bill contains no sufficient allegation of notice, and certainly it does not in technical terms, but taking it to be defective, which I doubt, I think that any defect in it is cured by the answer, which is sufficient to let in the evidence. It is plain from the evidence that the defendant understood the case which he had to meet. Again, it was argued that upon the construction of the agreement of 1823, that agreement had come to an end. But that question depends upon whether the workings had finally ceased, * and upon the * 583 evidence I am of opinion that they had not. I have read the evidence more than once with great care, and I am satisfied that it fully establishes that the plaintiffs were in possession of and working the coal on the estate in question between August, 1840, and January, 1848, when the defendant's purchase was completed. Several of the witnesses on the part of the plaintiffs speak to that fact in connection with circumstances which were calculated to fix it in their memory, and if untrue might readily have been contradicted on the part of the defendant, but which upon the evidence stand wholly uncontradicted. The evidence on the part of the plaintiffs is precise and positive. Nearly all the witnesses on the part of the defendant speak in loose and indefinite terms. The most material point suggested on the part of the defendant was, that the workings to which the plaintiffs' witnesses have spoken were on another part of the Crossley Hall estate. But not only does the evidence on the part of the plaintiffs directly contradict this suggestion, but there is scarcely any (if any) evidence on the part of the defendant to prove that there were any workings on those other parts of the estate at the period in question.

I think that upon the evidence before us the appeal is groundless, and that it must be dismissed with costs.

1856. July 26. Before the LORDS JUSTICES.

A decree for payment of what shall be found due to the plaintiff upon an account directed by the decree does not entitle him to a charging order under the 18th section of 1 & 2 Vict. c. 110.¹

THIS was an appeal from an order of Vice-Chancellor STUART discharging an order obtained by the appellant, whereby payment out of Court of a check for 400*l.*, in the hands of the accountant-general, had been stayed.

By an order made by the Lords Justices, in the cause of *Chadwick v. Holt*, dated the 10th of July, 1856, it was ordered that the sum of 400*l.*, standing in the bank to the credit of the cause, should be paid to the defendant, Mr. Holt, without prejudice to any question in the cause.

On the 21st of July, the appellant applied for and obtained, *ex parte*, in the cause of *Chadwick v. Holt*, an order charging the sum of 400*l.* payable to Holt in that suit, with the payment of the amount which might be found due to the appellant under a decree of the 23d of November, 1855, made in another suit of *Aubin v. Holt*, the object of which was to recover the arrears of an annuity of 300*l.* agreed to be paid by Holt, the defendant in both suits, to the appellant, upon an arrangement made on the 21st September, 1848, with respect to the business which they carried on in partnership as attorneys and solicitors. By the decree of the 23d of November, 1855, an account was directed to be taken of the arrears of the annuity, and it was ordered that what should be found to be due should be paid by the defendant to the plaintiff.

* 585 * This decree was registered by the appellant in the Court of Common Pleas, in pursuance of the 19th section of the Statute 1 & 2 Vict. c. 110.

On the 25th of July the order of the 21st of July was discharged by the Vice-Chancellor STUART upon the application of Holt.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1035, 1036, 1039.

Mr. Malins and *Mr. Roberts*, in support of the appeal, referred to, and commented on, *Miles v. Pressland*, (a) *Duke of Beaufort v. Phillips*, (b) *Tolson v. Dykes*, (c) *Lister v. Lister*, (d) and *Warburton v. Hill*. (e)

Mr. Cairns, *Mr. Hobhouse*, and *Mr. Prendergast*, for the respondents, were not called upon.

THE LORD JUSTICE TURNER. — In my opinion there is no foundation for the appeal nor any reason for questioning the correctness of the order of the Vice-Chancellor. The appellant has put his case on the ground that a judgment at law, though not for the payment of money, would, under the Act, be a charge. But the 13th section of the Act says, that every judgment of a Court of Law shall be a charge, whereas the 18th section, which alone gives jurisdiction to make orders of the kind now in question, only provides that all decrees and orders of Courts of Equity whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person shall have the effect of judgments in the superior Courts of common law. The Act, therefore, makes a distinction between * judgments at law and decrees and orders of Courts of * 586 Equity. Every judgment is to be a charge, but decrees and orders are to be a charge only when they are for payment of money.

I shall say nothing on the question whether the order must, for the purpose of coming within the Act, be for payment of a sum of money *in presenti*. It is enough to say that it must be an order for payment of money, and that the order here is only one for an account which is still pending and under which no money may ever become payable.

The case of the *Duke of Beaufort v. Phillips* has nothing to do with the present. A man may be a judgment creditor under the decree of this Court, but it does not follow that he is therefore a judgment creditor within the meaning of the Act. The appeal motion must be refused with costs.

(a) 4 Myl. & Cr. 431.

(d) 2 H. & T. 174.

(b) 1 De G. & Sm. 321.

(e) Kay, 470.

(c) 1 Ph. 439.

THE LORD JUSTICE KNIGHT BRUCE. — I think that the charging order ought never to have obtained. It has been discharged and so it must remain. Of course the appellant must pay the costs.

* 587

* HORNE *v.* BARTON.HEAD *v.* CROSFIELD.HEAD *v.* BARTLEY.

1856. June 7, 11, 18, 20, 25. August 2. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

On a petition for rehearing, circumstances subsequent to the order sought to be reheard cannot be regarded; and where those circumstances raise important questions, it is not just or expedient to enlarge the time prescribed by the General Orders for presenting petitions of rehearing before the Court has had an opportunity of seeing how those circumstances will be presented for its consideration. Where, therefore, petitions for the rehearing of orders made upwards of forty years previously, stated grounds for discharging the orders and setting aside a settlement made in pursuance of them, notwithstanding the length of time and intervening dealings and circumstances: *Held*, that the proper course was to order the petitions for rehearing to stand over for a limited time, with liberty to apply, and without prejudice to the rights of the petitioners to institute new suits, at the hearing of which the rehearing of the former orders might, if proper, be directed.¹

THESE were two petitions for a rehearing of orders made in the above causes as long ago as 1815.

By the decree made in 1813, the Master was directed to settle a proper conveyance according to the will of the testator Thomas Woodrooffe Smith. (a) The Master settled a conveyance accordingly, and exceptions having been taken to his report, Sir W. GRANT overruled them, and directed the conveyance to be executed according to the draft settled by the Master. A conveyance was

(a) See 19 Ves. 347; Sir G. Coop. 257.

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1473, 1476; *Turner v. Turner*, 2 De G., M. & G. 30, and cases in note (1).

executed which extended to a settlement of a reversionary interest of one Ann Barton in default of children, and it was now insisted that in this respect the conveyance was not according to the will and ought not to have been directed. The facts of the case appear sufficiently from the judgments.

Mr. Rolt, Mr. R. Palmer, Mr. Shapter, and Mr. Braithwaite, supported one of the petitions.

Mr. Malins, Mr. Cairns, Mr. A. Smith, and Mr. Gale, the other.

* *The Solicitor-General* (Sir R. BETHELL), *Mr. Follett, Mr. J. Baily, Mr. Little, and Mr. Bowring,* for the respondents. * 588

The following authorities were referred to: *Wheate v. Hall, (a) The Duke of Leeds v. Amherst, (b) Brandon v. Brandon, (c) Pelly v. Wathen, (d) Honner v. Morton, (e) Stacey v. Elph, (g) Cholmondeley v. Clinton, (h) Braybrook v. Inskip, (i) Gooch v. Gooch, (k) Wright v. Wright, (l) Smith v. Clay, (m) Standish v. Radly, (n) Wood v. Griffith, (o) Carew v. Johnston, (p) Turner v. Turner, (q) Lytton v. Lytton, (r) Mills v. Banks, (s) Brewster v. Angell. (t)*

Judgment reserved.

August 2.

THE LORD CHANCELLOR. — This case of *Horne v. Barton* came before the Court upon an application for leave to file a petition of rehearing. The necessity for such an application arises out of the General Order of the 7th of August, 1852, by which parties to suits are precluded from presenting petitions of rehearing after five years, but that provision is qualified by another section of the

- | | |
|---------------------------|--------------------------|
| (a) 17 Ves. 80. | (l) 16 Ves. 188. |
| (b) 2 Ph. 117. | (m) 3 Bro. C. C. 639. |
| (c) 2 Jur. N. S. 981. | (n) 2 Atk. 177. |
| (d) 1 De G., M. & G. 16. | (o) 19 Ves. 550. |
| (e) 3 Russ. 65. | (p) 2 Sch. & Lef. 280. |
| (g) 1 Myl. & K. 195. | (q) 2 De G., M. & G. 28. |
| (h) 2 Mer. 355. | (r) 4 Bro. C. C. 441. |
| (i) 8 Ves. 417. | (s) 3 P. Wms. 1. |
| (k) 3 De G., M. & G. 386. | (t) 1 J. & W. 625. |

order which gives authority to the Lord Chancellor either alone or with the Lords Justices to dispense with that restriction in cases in which it appears just and expedient so to do. This

* 589 *petition was presented by Mr. Head, and there is another presented by Mr. Reynolds for the same object. The object of the petitioners is to bring themselves within that exception, and to show that it is just and expedient that they should be at liberty to present a petition of rehearing just as if there was no general order restricting them to five years.

The question arises on the will of a gentleman named Thomas Woodrooffe Smith, dated the 22d of August, 1807, under which large estates were disposed of, and the personal estate was directed, after payment of legacies, to be invested in the purchase of lands, to be settled to the same uses as the estates which were devised by the will. Those estates were given in such a way as to carry the legal estate to trustees in fee, upon trust to settle the estates in moieties, one moiety on the testator's eldest daughter Anne Barton for her life, with remainder to her children in tail, with cross remainders among the children, and the other moiety to his only other child Maria Woodrooffe Smith for her life, with remainder to her children in tail, with cross remainders among them.

A year after his death (in 1812) the trustees filed a bill for the purpose of having the trusts of the will carried into execution, and to have the direction of the Court as to the settlement they were to make pursuant to the trusts declared in the will. A decree was made in that cause (*Horne v. Barton*) on the 9th of February, 1813, whereby the will was established, and it was referred to the Master to settle the proper deed to be executed by the trustees to carry into execution the directions of the testator. After that decree had been pronounced, but before any report had been made by the Master, some other property had been

* 590 purchased by the * trustees under the trusts of the will for the investment of the personalty in the purchase of real estate. A petition was presented, and the result was that by a supplemental order the property was directed to be included in the settlement as if it had formed part of the subject-matter of the suit when it was instituted. The Master made his report approving of the settlement. In that settlement he made not only cross remainders between the children of each marriage but cross remainders between the two families; that is, on any one of them

dying without leaving children the property was to go over to the other family.

There was no disposition in the will as to the ultimate reversion of the moieties after providing for the daughters and their issue, and therefore that reversion descended on the two daughters as coparceners. But the deed contained a settlement as well of those reversionary interests which the daughters took as coparceners as of those interests which were expressly devised to them, each daughter according to the terms of the settlement taking an absolute power of appointment of her moiety in default of issue, and in default of issue of either daughter, and in default of appointment, the moiety was limited to her own right heirs. That was the settlement approved of by the Master. There were exceptions taken to the report on the ground that the will did not authorize cross remainders between the two families. Those exceptions were discussed in a friendly argument apparently, but in a perfectly honest one. Gentlemen of eminence at the bar were instructed to argue on each side, in favour of the view of the Master and against it, and finally Sir W. GRANT disposed of the exceptions by approving of what the Master had done. (a) He thought that there were properly introduced into the *settlement * 591 cross remainders as well between the two families as between the two daughters in tail. The exceptions were, therefore, overruled. After the report of the Master and before the deed was executed some change had taken place in the trustees. One trustee had died and another had to be substituted, and there were one or two minor matters of detail, so that the order overruling the exceptions referred it back to the Master to amend the settlement in these formal particulars. He did so, and on the 18th of July, he made a further report approving the draft with these formal alterations. The settlement was then prepared and bears date the 17th and 18th of July, 1815, and under this settlement these large estates were conveyed in moieties in the mode which the testator had directed as to the moieties expressly devised; namely, one moiety to each daughter for life, afterwards to their first and other sons in tail, then to their daughters in tail with cross remainders among them, and in the event of either daughter dying without issue then her share was to go over to the

(a) 19 Ves. 398; Sir G. Cooper, 257.

other daughter, and if both the daughters died without issue, as to one moiety the eldest daughter Anne Barton was to have an absolute power of appointment, and as to the other moiety the younger daughter Maria was to have an absolute power of appointment. To this settlement Mr. Barton was a party, being one of the trustees. But Mrs. Barton and Miss Woodrooffe Smith, who at the date of the settlement was still an infant, were also made parties, although they had not even to consent. It is obvious that they were not necessary parties, because the trustees were only obeying the directions of the Court in executing this conveyance.

Part of the personal estate of the testator consisted of a mortgage of some property in Wood Street which had been * 592 mortgaged to him in fee to secure a sum of 10,000*l*. * The property was not worth more than that sum. The interest was in arrear. The mortgagors were in difficulties, and an arrangement was made between them and the trustees that the latter would accept a conveyance or become purchasers of the Wood Street property in satisfaction of the principal and interest due to them upon it. A reference was made to the Master to inquire whether that was a proper arrangement. The Master found that it was proper. The court approved of it, and consequently the equity of redemption was released. In 1819, by deeds of the 5th and 6th of July, the property was conveyed to the uses of the settlement which had been executed on the 17th and 18th of July, 1815. To that deed Mr. and Mrs. Barton (the married daughter and her husband) and the unmarried daughter, then about twenty-five years of age, were parties, and Mrs. Barton's interest was conveyed by a fine. As to the Wood Street property, therefore, there was a proper conveyance to the uses of the original settlement of the 17th and 18th of July, 1815.

Now supposing all this to have been regularly done, the interest of Mrs. Barton in the estate was this, that subject to her own life-interest, and to the interests of her children, if she should have any, and subject also to the life-interest in remainder to her sister, then unmarried, and her sister's children if she had any, she had an absolute power of appointing the fee-simple of these estates as she thought fit. In execution of the power so given to her by the deed of settlement of 1815, and which undoubtedly she had if that was a valid and proper settlement, she made her will on the 23d of September, 1822, and exercised the power by giving in effect

the whole of her interest to her husband Mr. John Barton. She died in the month of October, 1822, shortly after she made that will, without ever having had * any child. In the * 593 month of October, 1833, the younger daughter, Maria Woodrooffe Smith, married Mr. Head. No settlement appears to have been executed on the marriage, at least we have heard of none, but in the next year, namely, in 1834, she with her husband concurred in a deed, which was acknowledged by her according to the statute dispensing with the necessity of a fine, and which conveyed all her interest, in her own moiety, to which she had an undoubted right under the settlement as well as under the will, and also whatever interest she had under the will in her sister's moiety, supposing that to have been improperly settled so as to give the sister the power of appointment. She conveyed the whole of this in such a manner that she had an absolute power of appointing the whole. She died in 1854, without ever having had any issue, having by her will given all her property to her husband. I do not go into details. That is sufficiently accurate for the present purpose. I should have stated that Mr. Barton died in March, 1852, and that by his will he gave every thing he was entitled to upon certain trusts.

This being the state of the property, Mr. Head, who was the devisee of all that Mrs. Head could dispose of, contends that as, independently of the will of the original testator, Mrs. Barton, as one of his co-heiresses at law, took the reversion in fee of a moiety, and as that reversion was never properly settled or disposed of, she having levied no fine, it was an improper act on the part of the trustees to convey the legal interest in that reversion so as to give her a power of appointment over it,—that the trustees had no authority to convey, according to the directions of a married woman, without any fine being levied, and that consequently in equity she continued up to her death seised in fee-simple of this moiety without any power of disposition by will; that consequently * on her death it descended on her * 594 sister as her heiress-at-law; and that he Mr. Head (claiming by devise from the sister, or by an appointment made under a settlement executed by the sister which included all her interest) is entitled to the moiety of Mrs. Barton as well as his own;—or that he would be so entitled were it not that by the orders and decrees of the Court he is embarrassed, and, therefore, he says,

that he ought to be at liberty to have those orders reheard, in order that he may obtain the proper relief.

Mr. Reynolds's petition is a similar one, and he claims to be entitled to Mrs. Barton's share not in the whole of the property, but only in that portion of it which was personal estate at the death of the testator, and which Mr. Reynolds contends was also improperly made the subject of settlement. He contends that it is to be distinguished from that which was real estate at the death of the testator by this circumstance, that the settlement of 1834 made by Mr. and Mrs. Head after their marriage, did not extend to the former portion of the property, and that consequently he (Mr. Reynolds) is entitled to a rehearing of the erroneous order in respect of that portion of the property.

The substantial question is whether or not Mr. Head in his appeal which relates to all the property, and Mr. Reynolds in his appeal which relates only to a portion of it, but which must stand or fall on the same ground, have made out a case which entitles them to present petitions for the purpose of having the case reheard and the whole matter set right from the beginning.

Now, in the first place, it is clear to all of us, I believe, that a mere rehearing will not effect the object which the petitioners have in view. Supposing them entitled to relief, they cannot obtain it upon a mere rehearing as * to the property which was settled after the original proceedings in 1813, 1814, and 1815; namely, the Wood Street property. But if the matter is regarded closely it will be seen that no relief can be obtained without a bill being filed for the purpose, in respect of any portion of the property, because, under the decree of the Court, legal interests were created by the settlement of 1815, and have been dealt with by the appointment of new trustees and subsequent conveyances. In considering, therefore, whether we ought to interfere to give that relief to the parties for which they ask it, the proper way is to consider the case first, as if there had been no suit and no decrees at all, and as if the trustees had of their own authority, and in the execution of the trusts, executed the deeds, which in fact they executed not of their own authority, but with the sanction of the Court, and under the decrees and orders sought now to be reheard. Could, then, the petitioners, Mr. Head and Mr. Reynolds, or either of them, now sustain a bill to have the settlement so made by the trustees of 1815 rectified?

That is the question. The petitioners say that they would have been so entitled if there had been no orders or decrees in their way. They say that up to the death of Mrs. Head (which only took place immediately before his petition was presented in the year 1854), the enjoyment was strictly in conformity with the terms of the will; that according to the will Mrs. Barton was to take one moiety for life, with remainder to her children, and that on her dying without children, in 1822, that moiety as well as the other moiety, which originally was given to Maria, was to be enjoyed by her for life, with remainder to her children if she had any. Therefore, says the petitioner, Mr. Head, the error never became material until 1854, when Mrs. Head died, because then arose the question who was entitled to the ultimate reversion. Then, and not till then, arose the question as to who ought to enjoy * the property. Therefore, he says, if proceedings * 596 were taken at the time when the enjoyment was to take place, that was soon enough, and that it would have been idle to file a bill to have the interest in an ultimate reversion, which had been improperly disposed of, rectified, when, if there had been a tenant in tail born, there would have been a valid settlement of the property. In answer to that the respondents on this occasion, those claiming under Mrs. Barton, say it would be most unjust now to interfere on behalf of Mr. Head, for they say that under the deeds which were in point of fact executed, rightly or wrongly, in 1815, the legal interest was so conveyed that Mrs. Barton became absolutely entitled, notwithstanding her coverture, to dispose of the moiety in reversion which had descended on her as coparcener; and they say that although the disposal of it may not have been perfectly completed by a fine, the circumstances of the case lead irresistibly to the conclusion that this was what the parties intended, and that, therefore, it would be very unjust, and not conformable to the principle on which Courts of Equity usually act, to interfere after so great a lapse of time to alter that which is legally right, and which carries into execution the intention of the parties.

[After referring to some of the circumstances relied upon in support of this argument his Lordship said :—]

There are a number of other circumstances which were adverted

to. I have only alluded to the more prominent ones. We then come to the question, what is the Court to do? A petition of rehearing cannot be presented now except within five years; but if the circumstances of the case are such as to lead the Court to think it would be just and expedient to permit it, then the Court is at liberty to dispense with that rule.¹ It must be observed that

during all the period of time that elapsed from the execution of the settlement in 1815 up to the death of * Mrs.

Barton, Mr. and Mrs. Barton might have acquired the right now in dispute by levying a fine, if they had thought fit so to do, and it might be a question if a bill were filed whether the conduct of Mrs. Head, then Miss Woodrooffe Smith, was not tantamount to her saying to Mr. and Mrs. Barton, "you need not trouble yourselves to levy a fine, for I will take it just as if you had levied a fine." Whether that would be a legitimate inference or not is not a question that we ought to dispose of on the present application.

The conclusion at which we have arrived is this: that we ought not to interfere here by permitting any of these orders to be called in question until the parties seeking to obtain from us an order enabling them so to do shall have previously established by independent proceedings their title to the relief which they ask if there were no orders standing in the way. The course to which we feel inclined to take is this, to leave the parties at liberty within a limited time if they shall be so advised, say before next Hilary term, to file any bill they may think fit for the purpose of establishing their title to the relief which they are now seeking. Upon such bill being filed, or probably when that cause is duly proceeded with and the parties have put themselves into such a position as to be entitled to relief but for the intervention of those orders supposing them to have been erroneous orders, the time will then, and we think not till then, have arrived at which we can safely and properly decide whether the petitioners ought to be at liberty to call those orders in question. Therefore the order will be, that this petition do stand over till Hilary term without prejudice to any bill or bills which the petitioners may file for the purpose of asserting any title which they consider they may have under the

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1476, n. (3); 1478, n. (5); 1493, n. (2); 1497, n. (8).

will of Thomas Woodrooffe Smith, and there will be liberty for all parties to * apply. We do not mean to say that the * 598 mere fact of a bill being filed would induce us of necessity to give leave to present a petition of rehearing ; but unless such a bill shall be filed the respondents will be at liberty to apply, and on the petitions coming on again we shall know how to dispose of them.

THE LORD JUSTICE KNIGHT BRUCE. — The interests or claims to which these petitions relate and which they seek to assert respectively are of two classes. First. Such as would have belonged to Mrs. Woodrooffe Smith, the widow of the testator in the cause, if instead of having died as she did in the year 1839, she were now alive. Secondly. Such as would have belonged to their surviving daughter Mrs. Head were she and her mother now alive. With regard to the former it is plain that the petitions having been presented respectively not before the year 1853, and the order, chiefly if not solely the object of attack on this occasion, having been made in the year 1815, it is incumbent on the petitioners to answer the objection which obviously *prima facie* is by lapse of time raised against them, although the order of 1815 appears (I agree) to be an order materially erroneous. This objection, if it can be answered at all, can, I think, be answered only on two grounds or one of them : first, the disability of Mrs. Woodrooffe Smith ; secondly, the reversionary and contingent nature during Mrs. Head's life of the interests or claims comprised in the first class. With regard to disability the widow was under one only, if any, but that one certainly serious. It is said, namely, that she was of unsound mind when all the orders previous to 1839 were made, and that she so continued to her decease. The fact may possibly have been so. But she is not proved or represented to have been at any time the subject * of a commission of lunacy, and I col- * 599 lect that whatever the state of her mind, whether sound or unsound, at the time of the commencement of the original suit, the same state continued from that time uninterruptedly down to the end of the year 1823 or to her death. It was, however, as a person of sound mind, as a person in all respects competent, that she by a solicitor or solicitors appeared, and by solicitor and counsel defended in the original suit, that in which the orders previous to 1839 were made. She signed her answer, she was joined as a

petitioner in the petition of rehearing which produced the order of 1st March, 1822, and there is not, as I understand, a trace in the records of the Court during any part of her life of her having been represented, deemed, or treated as a person not of properly sound mind or as a person under any disability or incapacity whatever. It would not then I think be safe or right on general considerations, it would not I conceive be according to precedent or analogy, or be "just and expedient," to enter for the mere purpose of granting or refusing a rehearing of the order of 1815, or granting or refusing an order for leave to present a petition for rehearing it, into the question what was her state of mind at any time. If a bill shall be filed seeking any relief on the ground wholly or partially of her state of mind in or before or after the year 1815, it may possibly in some event or stage of such a cause be proper to provide for a rehearing, such as in my opinion cannot at present be granted or authorized or facilitated by the Court. I do not wish now to prejudice or assist, or to discourage or encourage a bill of any kind. But, as I have said, we ought in my judgment now, in the state of the documentary and other evidence before us, neither to assume or suppose that Mrs. Woodrooffe Smith was not, nor to direct any inquiry whether she was, at all times during her life of sound mind.

* 600 * Taking the case, then, for every present purpose, as if that lady had uniformly been of sound mind (to do which is, in my opinion, I repeat, not inconsistent with the authority of *Carew v. Johnston*), I think that the reversionary contingent nature of the rights, if any, belonging to her by reason of the partial intestacy, if there was a partial intestacy, of her husband furnishes for any present purpose neither apology or excuse. As far as rehearing is concerned I am of opinion that the claims of Mrs. Woodrooffe Smith and of her estate stand on the same footing as they would if vested and immediate rights of that lady had been prejudicially affected in an erroneous manner by the order of 1815. With regard to the first class, consequently, an order favourable to the petitioners, or either of them, ought not, in my opinion, now to be made on either of the petitions. Whether we should dismiss them or direct them to stand over is a different question.

Next, as to the second class. What I have said concerning the first is not wholly inapplicable to this. But it may be further

observed, that Mrs. Head, who was a minor when the order of 1815 was made, attained her majority in that year, nor was she at any time between that event and her marriage in the year 1833 under any disability, and it must, upon the evidence, be taken that Mr. Barton's death having happened in October, 1822, Mrs. Head in January, 1823, was not ignorant of any fact material for her to know in order to her forming a correct judgment what were then her rights under her father's testamentary dispositions, or by descent from him, or by descent from her sister, or in respect of having been one of the next of kin of her father. Mrs. Head was in or before January, 1823, aware of her sister's will, nor is Mrs. Head in my judgment proved to have been at any time under any mistake as to matter of fact. * Whether in or * 601 before or after January, 1823, Mrs. Head was, previously to her marriage, aware of the true extent or nature of her rights is a different question.

Prima facie and presumptively I apprehend that a person under no disability, who has a full knowledge of facts from which rights of property arise or accrue to that person, ought to be deemed to be aware also of those rights. Perhaps, however, there is evidence before the Court sufficient to displace that presumption in the present instance as to Mrs. Head, a point, however, on which I give no opinion. For whether the evidence be sufficient or insufficient for that purpose is, in my judgment in the particular circumstances before us, not a material question. I am satisfied that during the whole time between Mrs. Head's execution in 1815 of the settlement in that year and the time of her marriage, she wished that settlement to have full force and effect according to its tenor, and that from the time of her knowledge of Mrs. Barton's will (which knowledge was acquired in January, 1823, or earlier), Mrs. Head continually, until her marriage, wished that will to have full force and effect. I am satisfied that from a time preceding the year 1816, continually during the residue of Mrs. Barton's life, she and her husband were allowed to believe and did believe that no act beyond what had been done in 1815 was necessary or could be required for the purpose of enabling her to make effectually the will which she did make. I am satisfied that Mr. Barton married in 1828, in the belief, reasonably entertained by him, that the validity and efficacy of his former wife's will were not disputable or would not be disputed. The present petitions

were, I repeat, presented respectively in the year 1855, more than twenty years after the marriage of 1828, and more than thirty years not only after Mrs. Barton's death but after January, * 602 1823. And * the question may be asked whether if Mr.

Head had died instead of his wife at the time when her death happened and she were still living, and had presented in 1855 such a petition as he has presented, that is to say, a petition in every respect *mutatis mutandis* the same, she, all things else being as they are, would have been entitled now to an order upon it. I think that she would not. I conceive that by her conduct before her marriage, with the knowledge that she had and by lapse of time, if not by the latter means only, her right at present to such an order would have been rightly and successfully disputed, nor is it possible in my opinion to say that Mr. Head can stand in a better position than in the state of things that I have supposed she would have done.

It appears to me that both petitions should be dismissed or stand over until further order, without prejudice to any bill or bills that may be filed before Hilary term next, and with liberty to apply. The latter course may possibly be preferable, and it seems accordant with what the Lord Chancellor thinks right.

THE LORD JUSTICE TURNER. — I am also of opinion that leave ought not be given to these petitioners to present petitions of rehearing. The orders on which the question depends are the 1st and 6th of the Orders of the 7th of August, 1852. It is unnecessary, I think, to observe upon the terms in which the 6th of these orders is expressed, since they plainly import that in determining the question whether leave should be given to present a petition of rehearing, the Court is to consider not merely whether the decree or order sought to be reheard is correct or not, but is to look at all the circumstances of the case and determine whether, under those circumstances, it is just and expedient * 603 * that the leave should be given. It is sufficient to consider the very nature and effect of a petition of rehearing. Its effect is this, that the decree or order complained of is to be upheld, reversed, or altered according to the circumstances as they stood at the time when it was pronounced. Circumstances which have subsequently occurred are not and cannot be taken into account. Where, therefore, those circumstances raise important

questions, proper for the determination of the Court, it cannot, in my opinion, to use the language of this order, be just or expedient that leave should be given to present a petition of rehearing, until the Court has had the opportunity of seeing what weight is due to those circumstances, or at all events in what mode they may be presented for its consideration.

I think that the prayer of these petitions ought not now to be acceded to ; but if upon the hearing or at some other stage of any suit which the petitioners may be advised to institute it should appear, that notwithstanding what has occurred since the orders now sought to be reheard were pronounced, the petitioners are entitled to relief, and that those orders present the only obstacle to that relief, I am not prepared to say that the leave to rehear may not be given, as it was suggested that it might in *Gwynne v. Edwards*. (a) I desire, however, not to be understood as prejudging that question. I think that it will depend upon the case as it may then stand, nor do I propose now to go into the merits, for I think it would not be right to do so, as they will be involved in the future proceedings. I think, therefore, the proper order now to be made is, that these petitions stand over with liberty to apply.

* HODGSON v. SMITHSON.

* 604

1856. November 5. Before the LORDS JUSTICES.

A will contained a bequest to the testator's wife for life, with a direction that it was, after her decease, to become the property of M., "or, in case of her decease, to be equally divided between her children living." M. died in the testator's lifetime, leaving an only child, who survived the testator, but died in the lifetime of his widow: *Held*, that the representatives of the only child of M. were entitled to the bequest.¹

THIS was the appeal of the next of kin of the testator in the cause from the construction put by the Master of the Rolls upon a clause in a will.

(a) 9 Beav. 22.

¹ See 2 Jarman Wills (3d Eng. ed.), 172-178; *In re Bennett's Trusts*, 9 K. & J. 280; *Harcourt v. Harcourt*, 26 L. J. Ch. 536; *Wildman's Trusts*, 1 Johns. & H. 299; *Kirkman's Trusts*, 3 De G. & J. 550; *Penny v. Clarke*, 29 L. J. Ch. 370; *Crause v. Cooper*, 1 John. & H. 207.

The case is reported below in the 21st volume of Mr. Beavan's Reports. (a)

The material part of the will was as follows :—

"I give likewise unto my wife Ann Hill the interest upon whatever money I may have in the 3l. per cent consols, or any other stocks I may have, during her natural life. I do direct that, after my wife's decease, one-half of the property belonging to me in the 3l. per cent consols shall be disposed of as follows : " (The testator then disposed of that half and proceeded thus :) " The other half of my property in the 3l. per cent consols shall (after my wife's decease) become the property of my cousin, Mrs. Morville, of Wakefield in Yorkshire, or, in case of her decease, I do direct that it shall be equally divided between her children living."

The will was dated in 1814. Mrs. Morville died in 1816, leaving her only child, Mrs. Burrell, surviving. The testator died in August, 1819, Mrs. Burrell in July, 1820, and the testator's widow in 1854.

The plaintiffs claimed by their bill, under an assignment * 605 by way of mortgage to them, after Mrs. Burrell's death, by her husband and administrator, the moiety of the testator's property in 3l. per cent consols, given for the benefit of Mrs. Morville and her children by the will. This claim was resisted by the next of kin of the testator, who insisted that, upon the true construction of the will, and in the events which had happened, the testator had died intestate as to the property claimed by the bill.

• *Mr. Roundell Palmer* and *Mr. Brodrick*, for the plaintiffs.—Strictly speaking, the word "living" means living at the time at which the word is spoken or written. Here, however, the last antecedent with which it can be connected is the expression, "or in case of her decease;" and the construction most consistent with the rest of the will is to apply it to those words, and to read it as meaning "living at the decease of Mrs. Morville." The children are to be substituted for their parent, and the class to be substituted would include all children coming into existence between the date of the will and the death of the tenant for life,

who, subject only to the contingency of surviving the testator, would take vested interests. *Le Jeune v. Le Jeune*, (a) *Ive v. King*. (b) To hold that their interests depended on the contingency of their surviving the tenant for life would in this case lead to an intestacy; and the Court, unless forced by the context, will not adopt a construction leading to such a consequence. *Barker v. Barker*. (c) It is submitted, therefore, that the decision at the Rolls is correct, and that Mrs. Burrell took a vested interest in a moiety of the 3l. per cent consols left by the testator.

* *Mr. Bagshawe* and *Mr. T. H. Palmer*, for the assignees * 606 in bankruptcy of the husband of Mrs. Burrell.

Mr. Lloyd and *Mr. H. F. Bristowe*, for the appellants. — The word “living” must be read as referring to the period the testator had in his mind when he made the disposition in question, viz., the period when he intends the substitution to take effect, or in other words the death of the survivor of himself and wife. *Galland v. Leonard*, (d) *Neathway v. Reed*, (e) *Wordsworth v. Wood*, (g) *Ive v. King*. (b)

It is submitted, therefore, that as to a moiety of the 3l. per cent consols there is an intestacy.

Mr. Martin Ware, for the legal personal representatives of the testator.

THE LORD JUSTICE KNIGHT BRUCE. — The point in this case is a very arguable one, and has been well argued by *Mr. Lloyd* and *Mr. Bristowe*, but the inclination of my opinion is, that the view of the Master of the Rolls is right. If, however, it is not clearly right, the point is still, I think, too doubtful to enable this Court to disturb his decision.

THE LORD JUSTICE TURNER. — Upon the question raised upon this will I concur in the view taken by the Master of the Rolls. I should be sorry to say one word to disturb any of the cases

(a) 2 Kee. 701.

(d) 1 Swans. 161.

(b) 16 Beav. 46.

(e) 3 De G., M. & G. 18.

(c) 5 De G. & S. 753.

(g) 2 Beav. 25; 4 Myl. & Cr. 641; 1 H. L. Cas. 129.

which have been decided upon the construction to be put
 * 607 upon * the word "surviving."¹ But this is a case of a
 different description. It is a case of substitution. The
 testator clearly intended Mrs. Morville to take if she survived his
 widow; but he foresaw that, in the event of her not surviving him-
 self and his widow, there would be a gap in the disposition of the
 fund; and, foreseeing this, he supplied this gap by substituting in
 her place her children living at the time when the gap opened.
 The decision of the Master of the Rolls is, in my opinion, correct,
 and the appeal must be dismissed.

No costs on either side.

In the Matter of The SAINT MARYLEBONE JOINT STOCK
 BANKING COMPANY, and

In the Matter of "THE JOINT STOCK COMPANIES WIND-
 ING-UP ACTS, 1848 and 1849."

DR. WALKER'S CASE.

1856. November 3, 4, 11. Before the LORDS JUSTICES.

The directors of a joint-stock banking company passed a resolution that the
 shares of one of them, who was desirous of retiring, should be taken by the
 company at par; and that a release and indemnity might be arranged with
 the solicitors of the parties. Upon the footing of this resolution the director
 retired, and after his retirement debts were contracted and ultimately the
 company was ordered to be wound up. The director was placed upon the
 list of contributories, the resolution having been held by the Court, on
 appeal, not binding on the company. *Held*, that the part of the resolution
 as to indemnity depended on the validity of the retirement, and that a
 co-director, who had not been present when the resolution was passed, but
 continued to be a director afterwards, was not precluded by it from calling
 on the retired director to contribute to the repayment of what the other
 director had overpaid beyond his share in respect of the debts contracted
 after the date of the resolution.²

¹ See *Neathway v. Reed*, 3 De G., M. & G. 18, n. (1).

² See 1 Lindley Partn. (Eng. ed. 1860) 613-615; *Ex parte Morgan*, 1 Mac.
 [470]

THIS was a motion by way of appeal on behalf of the Rev. S. E. Walker, D.D., the personal representative of the late Mr. Edmund Walker, from the decision of Vice-Chancellor KINDERSLEY in the winding-up of the above company, declaring that one of the respondents, the Earl of Harrington, ought to be exempted from contributing * to the payment of a debt of 11,400*l.*, * 608 claimed on behalf of the estate of Mr. Walker against the company.

The Saint Marylebone Joint Stock Banking Company was established in 1836, and commenced business on or about the 5th of September in that year.

The appellants were the directors, and executed the deed of settlement.

In 1838 a discussion arose at the board of directors, in the course of which the Earl of Stanhope and another director protested against a system of re-discounting bills which had been adopted, and the majority of the board disagreeing with them on this point, the earl (then Colonel Stanhope) communicated to the directors his wish to retire from the direction and proprietorship.

At a meeting of the directors held on the 9th of May, 1838, the following entry in the minute-book was made.

“Terms of Colonel Stanhope’s retirement from the direction :—

“Colonel Stanhope’s shares to be taken at par with dividend to day of transfer, if realized. Release and indemnity may be arranged by the solicitors of the parties, and his proportion of attendance fees to be paid up to the time of his retirement when the same shall have been voted.

“FRANCIS CHARLES KNOWLES, *Chairman.*”

The following entry was made in Colonel Stanhope’s account in the stock-account ledger :—

“Dr.—1838, May 19th: Stock for amount cancelled, fifty shares, 550*l.*”

* A new director was appointed in the place of Colonel * 609 Stanhope, but it did not appear that his shares were ever

& G. 225, n. (1), 240, n. (1); *Spackman v. Evans*, L. R. 3 H. L. 171; *Bennett’s Case*, 5 De G., M. & G. 284 and note (1); *Angell and Ames Corp.* (9th ed.) § 534 and note, § 603.

reissued, or that the terms upon which Lord Harrington had retired were sanctioned by or made known to the shareholders.

The appellant was not present at the meeting of directors on the 9th of May.

Mr. Robinson, the solicitor of the company, deposed that Mr. Walker was informed of the terms of the retirement of Lord Harrington, both previously and subsequently to the meeting. Lord Harrington took no further part in the management of the company, but no deed or indemnity was ever executed or drawn up in pursuance of the minutes of the 9th of May.

In December, 1848, the order for winding up was made, and, the earl's name having been placed on the list of contributories by the Master, the decision was affirmed by Lord Justice KNIGHT BRUCE, then Vice-Chancellor. (a)

The appellant and others of the shareholders had, after Colonel Stanhope's retirement, advanced large sums of money to pay off the balances due to the customers of the bank.

The Master (Sir G. ROSE) made a call for the payment of the sums advanced by Mr. Walker. Lord Harrington insisted that he was not liable to pay the call, as he was entitled to be indemnified under the minute of the 9th of May, 1838, and ought not, * 610 therefore, to be held liable to * contribute towards payment of the debt claimed by Mr Walker's representatives. The Master held Lord Harrington to be liable, but the Vice-Chancellor, by the decision under appeal, reversed that decision.

Mr. Selwyn and *Mr. Cole*, in support of the appeal. — There is no evidence to show what the release and indemnity were to be, and the terms of the resolution are too vague to be acted upon, even if Mr. Walker had agreed to or been bound by it. But in fact he was not. The entry of the resolution in the book could not bind Mr. Walker personally by an agreement to indemnify the earl. The agreement, if any, was that of the company, but as the transaction has been decided not to be binding on the company, the agreement to indemnify (which was part of it) was altogether void.

They referred to *Lord Londesborough's Case*, (b) *Bennett's Case*, (c) *Walters's Case*. (d)

(a) See *Stanhope's Case*, 3 De G. & Sm. 198.

(b) 4 De G., M. & G. 411.

(d) 3 De G. & Sm. 149, 244.

(c) 18 Beav. 339; 5 De G., M. & G. 284.

Mr. Southgate, for the Earl of Harrington. — Mr. Walker was cognizant of and had acquiesced in the minute of May, 1838, and the whole arrangement. He continued to act as a director and to be a shareholder after that arrangement was entered into, and indeed the debts, in respect of which the contribution is sought, were nearly all contracted after the date of the minute, and therefore not upon the faith of the earl being liable to contribute to them. Mr. Walker must be taken to have agreed, either expressly or by his conduct with the earl, that the earl should retire and be indemnified.

* *Mr. Roxburgh*, for the official manager.

* 611

Mr. Selwyn, in reply.

Judgment reserved.

November 11.

THE LORD JUSTICE KNIGHT BRUCE. — In this case (connected in a sense with that reported in *De Gex & Smale*, (a) a decision which was, I still think, correct), it is, I think, immaterial whether the three minutes of May, 1838, are treated as separate minutes, or substantially as one. I will describe them as one. It appears to me that, by whomsoever, to whomsoever, of whatsoever, for whatsoever the release or the indemnity which the minute mentions was, according to its meaning (if any) to be given or made, the minute does not express (nor was made with) an intention upon the part of any person who was in form or substance a party to it, that there should be either release or indemnity, unless on the footing or as a consequence of the validity of the purchase, and the efficacy of the extinguishment (for which the minute, if intelligible, must be taken as providing) of the shares in the bank belonging to Lord Harrington, then Colonel Stanhope. But that purchase, that extinguishment, was invalid, was ineffectual, never substantially has taken place, never can take place. The minute seems to me to have been, in effect, a nullity, so far at least as purchase or extinguishment was concerned.

(a) Vol. III. p. 198.

I may here observe that the late Mr. Walker is not proved * 612 (nor can be supposed) to have been present when * the minute or any portion of it was made or agreed upon, nor is there evidence or ground for inferring that he had given authority to any persons or person to make or enter into any such minute or agreement. Certainly Mr. Walker was originally not bound by the minute or any portion of it, at least as to the purchase or extinguishment, or by the agreement (if any) as to purchase or extinguishment, which the minute constituted, expressed, or evidenced, or was meant to constitute, express, or evidence. I have, however, been assuming in favour of Lord Harrington that Mr. Walker did, by conduct subsequent to the minute, become, in effect, a party to it, or ratify it against himself, or adopt it. In my view, however, of the materials before the Court there is no evidence of any such conduct, to which, as I conceive, silence and inaction upon his part with knowledge of the existence of the minute did not (if the fact was so) amount.

Without, therefore, giving any opinion as to other grounds on which the learned Master, Sir GEORGE ROSE, is said to have proceeded in the present controversy, I am of opinion that his conclusion against Lord Harrington as between the noble earl and the estate of Mr. Walker was right.

Stress has been laid upon the alleged circumstance that the demand or part at least of the demand of Mr. Walker's representative, to which Lord Harrington is required to contribute, arose when Mr. Walker entertained a belief that the earl had effectually retired from the banking company, and effectually and completely ceased to be a partner; and his counsel have accordingly contended that not any contract with the bank, into which Mr. Walker entered under that belief, ought to be deemed a contract binding * 613 Lord * Harrington as between those two, an argument to which I have been unable to accede. The contract to which it applies was with the banking company of whomsoever composed. Nor if Lord Harrington were as between the two to be exempted, is it clear that the amount chargeable as between Mr. Walker's estate and other contributories would not be increased.

I am of opinion that Mr. Walker's estate and Lord Harrington stand towards each other for every present purpose in the same position as if neither the minute of 1838, as to purchase or extin-

guishment, nor any such arrangement or attempted arrangement had ever been made or thought of.

6 THE LORD JUSTICE TURNER.—The question in this case is, whether Lord Harrington is entitled to be exonerated from so much of the call made by the Master as is required for the purpose of answering the amount due from the company to the estate of the late E. Walker, being the sum of 12,000*l.* agreed by him to be accepted by way of compromise of his claims for 6000*l.* and upwards on the balance of his banking accounts, and for several sums paid by him in respect of debts due from the company.

Lord Harrington's claim for exoneration arises thus: He was a shareholder and director of the company, and in the year 1838 differences had arisen between him and the other directors as to the management of the bank. In consequence of those differences it was agreed that he should retire from the direction upon terms which were embodied in a resolution of the directors of the 9th of May, 1838, and which was as follows: [His Lordship read it as set out above.]

* The late Mr. E. Walker was at this time also a share- * 614 holder and director of the company, but he was not present at the meeting at which the resolution of the 9th of May was passed. Mr. Robinson, however, who was then the solicitor of the company, states by his affidavit: [His Lordship read the material portions to the effect above stated.]

In pursuance of the above resolution Lord Harrington retired from the direction, and soon afterwards his shares were cancelled and he was credited with the value of them in his account with the bank. From the time of his retirement he took no further part in the management of the bank, but the late Mr. E. Walker continued to be a director until the concern was ordered to be wound up. In the course of the proceedings under the winding-up order, the question arose whether the arrangement with Lord Harrington, under which his shares had been cancelled, was binding upon the company, and it being held that it was not, he was placed upon the list of contributories. What is now insisted upon on his behalf is, that although he may be liable to other creditors of the company, he is not liable to the estate of Mr. Walker. It has been so held by the Vice-Chancellor KINDERSLEY, and the appeal we have now to dispose of is from his decision.

The case may be considered in several points of view. First, without reference to the resolution of the 9th of May, 1838. It was argued on the part of Lord Harrington that the late Mr. E. Walker, having been a director of the company, must be taken to have known that Lord Harrington had ceased to be a shareholder, and that having dealt with the company with that knowledge, he cannot claim against Lord Harrington any moneys which

* 615 became due to him in respect of those * dealings. But the

Court has held that the cancellation of Lord Harrington's shares was not warranted by the company's deed, and that Lord Harrington, therefore, continued to be a shareholder, and continuing to be entitled to the benefit of the shares he must, as I think, have continued subject to the liabilities attaching upon them. He could not, as I conceive, be entitled to the profits and yet not be liable for the debts.

If, therefore, Lord Harrington's case can be supported at all, I think it must be upon the footing of the resolution of the 9th of May, 1838, and his case, indeed, was mainly rested upon that resolution. It was argued on his behalf, that by virtue of that resolution the late Mr. Walker must be taken to have agreed, either that he and the other directors personally, or at all events that the company would indemnify Lord Harrington, and that in either of these views the estate of Mr. Walker could maintain no claim against him. I think, however, that this resolution cannot be construed to have amounted to an agreement on the part of any of the directors, and more especially to an agreement on the part of the absent directors, personally to indemnify Lord Harrington. It is plain from the terms of the resolution that it was not determined what the indemnity was to be, or by whom it was to be given, and as the transaction was ultimately carried out with the company, and all parties were, as it was admitted at the bar, acting *bonâ fide* in the belief that it could lawfully be so carried out, I think that if the transaction had been capable of being supported, it must have been supported at the expense of the company, and that the company, and not the directors personally, must have indemnified Lord Harrington. But then the transaction has been set aside by this Court, and whatever might have been the consequence

of this if the directors had been personally bound to indemnify Lord * Harrington, and I am by no means satisfied that even in that case any different consequences would have fol-

lowed, I think that the transaction having been set aside any liability which the directors may have been subject to, in respect of any agreement for indemnifying by the company, must, under the circumstances of this case, have fallen with it. The transaction being *bond fide* and entered into upon the faith of the company being capable of being bound, I do not think that the Court in setting it aside could reserve any liability of the directors in respect of it.

For these reasons I think that the order of the Vice-Chancellor has gone too far, and must be discharged. I have assumed in what I have said, that the late Mr. Walker was liable for the acts of his co-directors, but I desire not to be understood as giving any opinion upon that point.

GREGORY v. PILKINGTON.

1856. November 21, 22. Before the LORDS JUSTICES.

Where a mortgage-deed had been mislaid for many years, and interest had been paid and received at a lower rate than that reserved by the deed, the payment having been made during a portion of the time under a decree in an administration suit on an erroneous affidavit as to the contents of the missing deed: *Held* (the case not being one to which the Statute of Limitations applied), that a tenant for life of the interest on the mortgage debt, who was not shown to have agreed to take less than the reserved interest, was entitled to payment of the difference since she became tenant for life.

THIS was an appeal from the decision of Vice-Chancellor KIN-
DERSLEY, on a petition, holding that the petitioners were not
entitled to the payment of the excess of the interest which had
been reserved on a mortgage above that which had been paid and
accepted for upwards of fifteen years.

The mortgage was dated the 30th of January, 1836, * and * 617
thereby Sir Edward Dodsworth, since deceased, conveyed
freehold estates to George L. Kaye to secure 15,000*l.*, with interest,
at 4*l.* 10*s.* per cent.

By a settlement made upon the marriage of John Ward and
Henrietta Kaye, one of the petitioners, the mortgage debt of
15,000*l.* was settled upon trust, that the interest should be paid

to the husband and wife for their lives, and that the capital should afterwards be divided among the children of the marriage.

John Ward died in October, 1840, intestate, and letters of administration were granted to his widow, one of the present petitioners, who afterwards married Mr. Elliott.

Sir Edward Dodsworth died in 1846, having by his will made a devise in trust for payment of debts.

The suit was instituted to administer the estate of Sir Edward Dodsworth, and upon a reference to the Master affidavits were made that the mortgage-deed of January, 1836, had been for many years mislaid and could not be found, and that the interest covenanted to be paid upon the mortgage money was at the rate of 4*l.* per cent per annum, and the Master reported that it appeared from the evidence before him, that interest after that rate had been regularly paid from the date of the mortgage up to the period at which the report was made.

The petition, which was that of Mrs. Elliott and the trustee of her settlement, stated to the above effect, and also stated that in

June, 1855, the mortgage-deed had been found, when it was
 * 618 discovered that the interest * reserved and made payable was at the rate of 4*l.* 10*s.* per cent instead of 4*l.*; that until the discovery of the mortgage-deed, the petitioners had always believed the rate of interest to have been 4*l.* per cent, and that the same had accordingly been received ever since the date of the mortgage, but that it had been so received under a mistake and a misapprehension only; that the petitioners had never directly or indirectly agreed to accept or receive a less rate of interest than that which was fixed by the mortgage-deed; that applications had been consequently made for the payment of the arrears of interest and of the current interest in full, but without effect; and that there was now standing in Court to the credit of the cause, various sums of money arising from the sale of the estates of Sir Edward Dodsworth, applicable to the payment of the mortgage debt and the interest. The petition prayed that the arrears of interest arising from the difference between the rate of 4*l.* per cent and 4*l.* 10*s.* per cent (and amounting in the whole to 1126*l.* 17*s.* 6*d.*) might be paid to the petitioners out of the moneys so standing to the credit of the cause, and that if necessary the petitioners might have liberty to except to those parts of the Master's report whereby the

rate of interest reserved on the mortgage debt was found to be 4l. per cent only.

The Vice-Chancellor said that the principle to guide him in the decision of this cause was the same as that upon which he should proceed to correct an error in the Master's report, and that there was nothing to show that Mr. Ward did not consent to take 4l. instead of 4l. 10s. per cent in consideration of punctual payment. His Honor, therefore, declined to order payment of the arrears of interest.

* *Mr. Glasoe* and *Mr. Druce*, for the appellants. — They * 619 referred to *Milton v. Edgworth*. (a)

Mr. Baily and *Mr. Gordon*, for the respondents. — Both the mortgagor and the first tenant for life under the settlement of the interest of the mortgage money are dead, and there is nothing to show that they may not have agreed that in consideration of punctual payment a smaller rate of interest should be accepted; and even if there was a common error, the Court cannot, after so many years, set it right as to the past.

Mr. Torriano, for the plaintiff in the suit, who was a creditor of the testator.

THE LORD JUSTICE KNIGHT BRUCE. — This appears to me a case of universal mistake on a matter of fact and as the Statute of Limitations is admitted to be out of the question, I think that the error should be set right.

THE LORD JUSTICE TURNER. — If all the parties had been dead there might be some ground for presuming an agreement. But some of the parties by whom the interest has been paid are living, and do not allege the existence of any such agreement as regards Mrs. Elliott, who is the person now seeking payment, and I think her entitled to the difference of interest from the death of her husband.

1856. November 5, 25. Before the LORDS JUSTICES.

A client executed a mortgage to his solicitor for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solicitor undertaking to deliver the bills by a certain time, which he did. Four years afterwards the client changed his solicitor and obtained an order for taxation of subsequent costs, but declined the offer of the solicitor to have the costs secured by the mortgage included in the taxation, and obtained the order without prejudice to any question as to those costs. Two years afterwards the client filed a bill against the solicitor, to have the latter costs investigated and the account between the parties re-opened, but did not allege any specific overcharge or error. *Held*, that the suit was precluded by length of time and acquiescence.¹

Seemle, that what was said in *Lawless v. Mansfield*, 1 Dru. & War. 557, does not apply to a mortgage for bills of costs.

THIS was an appeal from the decision of Vice-Chancellor Wood, dismissing the bill which was filed by a client for the purpose of reopening accounts between himself and the defendant, who had been his solicitor.

The bill, which was filed on the 19th of May, 1854, stated an indenture of mortgage dated March, 1848, and made between Anthony Blagrove (the father of the plaintiff) of the first part, the plaintiff, John Henry Blagrove, of the second part, and the defendant of the third part, whereby Anthony Blagrove and the plaintiff, in order to secure to the defendant, his executors, administrators, or assigns the repayment of 2542*l.* 7*s.* 11*d.* therein expressed to be due and owing from Anthony Blagrove and the plaintiff to the defendant, with interest at 5*l.* per cent, conveyed and assured certain manors and hereditaments, in the counties of Somerset and Berks, to the defendant, his heirs, and assigns, subject to a proviso for redemption on payment by Anthony Blagrove and the plaintiff or either of them, their or either of their heirs, executors, or administrators, to the defendant of the sum of 2542*l.* 7*s.* 11*d.* and interest. The bill stated that on the indenture was indorsed a memorandum signed by the defendant in these words:

* 621 "Memorandum, that the *interest which shall accrue

¹ See *Shaw v. Neale*, 20 Beav. 157, 180; 3 Lead. Cas. in Eq. (3d Am. ed.) 116-118.

during the life of Colonel John Blagrove shall not be required to be paid until six months after his decease.

The bill further alleged: That the 2542*l.* 7*s.* 11*d.* was wholly made up of bills of costs, and that such costs were incurred in the prosecution of certain suits in this Court; that such bills of costs had never been taxed, and were not delivered to the plaintiff or submitted to him until long after the execution of the indenture of March, 1848; that no account showing how the full amount of the 2542*l.* 7*s.* 11*d.* was pretended by the defendant to be made up had ever been delivered to the plaintiff; that the 2542*l.* 7*s.* 11*d.* expressed in the security of March, 1848, was professedly only an estimated sum; that the plaintiff executed the several securities without further professional assistance than that of the defendant, and was induced so to execute them partly from the confidence which he placed in the defendant as his solicitor, and which he had since found was wholly abused, and partly under the pressure which the defendant exercised over the plaintiff, owing to the then embarrassed state of the plaintiff's affairs; that by reason of the absence of dates in the accounts and bills of costs furnished by the defendant to the plaintiff, and by reason that no complete accounts or bills of costs had ever yet been furnished by the defendant to the plaintiff, and by reason that the accounts and bills of costs purporting to form the respective considerations for the said several securities were all interwoven, the plaintiff was wholly unable to ascertain the amount properly due to the defendant, or the full amount of the errors in the said accounts; and the plaintiff submitted that the whole of such accounts ought to be made out in one continued series, with proper dates thereto; and that, for the reasons therein appearing, the defendant ought to be compelled * to verify the items in the same accounts, and * 622 that the plaintiff ought to be at liberty to surcharge and falsify the same accounts.

The bill, however, did not aver any specific instances of an erroneous or improper charge.

The prayer was for an account of the considerations received by the plaintiff from the defendant for the securities, and that for the purpose of ascertaining such considerations, the defendant might be directed, notwithstanding any settlement of accounts, and notwithstanding any agreement as to the amount due from the plaintiff to the defendant, to prove by evidence the actual sums advanced

in respect of any items which might be disputed in the accounts; that the bills of costs forming the considerations of the securities, notwithstanding any agreement as to their amount, might be taxed; that the plaintiff ought to be at liberty to surcharge and falsify the accounts; that all errors as well those specified as those not specified in the bill, and that all sums, which upon taxing the costs should be disallowed, might be deducted from the consideration expressed in the indenture of March, 1848; that the last-mentioned indenture might stand only as a security for such an amount as on taking the said accounts and taxing the said costs should, after deducting sums to be allowed the plaintiff as cash credits, be found to be fairly due from the plaintiff to the defendant, or at any rate that such indenture, when it should come into effect, might be declared to be a security for such sum only as should be found fairly due thereunder after the taxation of the said costs; and that, if necessary, a general account might be taken between the plaintiff and the defendant in respect of their money dealings and transactions.

* 623 * The defendant demurred. The demurrer was argued and was allowed, so far as it sought to set aside the securities other than that of March, 1848, chiefly on the ground that it appeared by the bill, that, by the decree made in a foreclosure suit instituted by the defendant against the plaintiff, those securities had been established, and that the bill, in effect, sought to re-open the whole of that decree.

It appeared by the evidence that the defendant, when the security was given, was acting as the plaintiff's solicitor in suits then pending; that before the plaintiff executed that security, the defendant submitted to him an estimate of what was then due to the defendant's town agents in the plaintiff's business, and to the defendant himself, in sums amounting together to the sum of 2542*l.* 7*s.* 11*d.*; that the latter sum was agreed to by the plaintiff as an estimated charge, the defendant undertaking to furnish him in the ensuing long vacation with the bills of costs, by which that charge would be made out; that, upon this footing, the plaintiff executed the indenture of March, 1848; that, in October, 1848, bills of costs were delivered by the defendant pursuant to his undertaking; and that it appeared by such bills of costs that there had been an error in the estimate of the agent's bill to the amount of 10*l.*, but that the defendant's own charges, which had been

estimated at 735*l.* 5*s.* 1*d.*, were shown by the bill of costs to have in fact amounted to 854*l.* 16*s.* 5*d.*

It also appeared in evidence that, in August, 1852, the plaintiff changed his solicitor; that in December, 1852, the plaintiff applied to the Court to have all papers, vouchers, and documents in the defendant's possession relating to his affairs delivered up, and obtained an order * for that purpose, and also for the * 624 taxation of all the defendant's bills of costs, except those included in the security of March, 1848, such order being made without prejudice to any question as to the plaintiff's rights in respect of the costs for which the latter security was given. It also appeared that on that occasion the counsel for the defendant offered to have the taxation extended to these costs, but that the offer was declined.

The case is reported in Messrs. Kay and Johnson's Reports. (a)

Mr. Rolt and *Mr. Cottrell*, for the plaintiff, in support of the appeal. — They referred to *Lawless v. Mansfield*, (b) *Horlock v. Smith*, (c) *Waters v. Taylor*, (d) *Matthews v. Wallwyn*, (e) *Hatch v. Hatch*, (g) *Gibson v. Jeyes*, (h) *Montesquieu v. Sandys*, (i) *Coleman v. Mellersh*. (k)

Mr. W. M. James and *Mr. Cairns*, in support of the decree of the Court below, cited *Sayer v. Wagstaff*, (l) *In re Harries*, (m) *Stedman v. Collett*. (n)

Judgment reserved.

November 25.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I was for a short time impressed in a manner favourable to the plaintiff by the circumstance * that in calculating and making up * 625 the sum of 2542*l.* 7*s.* 11*d.*, for which the security in question (that of 16th of March, 1848) was given, he had not credit

- (a) Vol. II. p. 509.
- (b) 1 Dru. & War. 557.
- (c) 2 Myl. & Cr. 495.
- (d) 2 Myl. & Cr. 527.
- (e) 4 Ves. 118.
- (g) 9 Ves. 292.

- (h) 6 Ves. 266.
- (i) 18 Ves. 302.
- (k) 2 Mac. & G. 309.
- (l) 5 Beav. 415.
- (m) 13 M. & W. 3.
- (n) 18 Jur. 457.

for the sum of 155*l.* mentioned in Mr. Routh's letter of the 24th of March, 1848. Further information and consideration, however, removed that impression from my mind. The omission, if incorrect, was not fraudulent, and there does not appear to have been at any time an intention upon Mr. Routh's part to do or sanction any injustice to the plaintiff in respect of that sum. Mr. Routh has never opposed, and has, before us, consented to a declaration being made by the counsel for the plaintiff's clear and effectual protection as to it (though I do not say that I think any such declaration necessary).

Then with regard to the amount of costs included in the security, I am not satisfied nor do I think it probable that if the bills were taxed that operation would reduce them by so much as a sixth. The plaintiff has, I think, established against Mr. Routh no case of oppression, no case of fraud, and (except as I have mentioned, if it is an exception) no case of mistake. Nevertheless, considering the relation that existed between them, considering that in the transaction of the security there was no solicitor, no professional person consulted or concerned (so far as appears), except Mr. Routh, considering that the bills of costs, though they were delivered before the year 1849, were not delivered until a time subsequent to the giving of the security, I think it probable that I should have held the plaintiff to be entitled to some relief on this record (relief that perhaps might not — perhaps might — have been of substantial use to him), but for the reasons or grounds that I shall mention. There is nothing, I think, to warrant a belief or suspicion that the memorandum as to suspending

the payment of interest during the life of Colonel John * 626 Blgrave (a * gentleman still living), which is endorsed on the security and signed by Mr. Routh, originated in any dishonest or oblique design on his part, — was not, on his part, fairly intended, — was not known to the plaintiff contemporaneously with the giving of the security, — or was not then willingly accepted by the plaintiff. Of that memorandum he has had and has the benefit. More than six years, from March, 1848, had elapsed when in May, 1854, the present bill (amended not immaterially in June, 1854) was filed. But the relation of solicitor and client between the plaintiff and Mr. Routh was determined in August, 1852, and not afterwards renewed. From August, 1852, they have been separated wholly and on unfriendly terms. On the

1st of December, 1852, was made, by the Vice-Chancellor STUART, the order of taxation in evidence, on which occasion I am satisfied that in Court *Mr. Prior*, as counsel for Mr. Routh, stated what he is represented to have then stated, and that the offer of extended taxation was declined. The order thus made I understand to have been obeyed, carried through, and executed.

In the particular circumstances that I have mentioned I think that this suit, if not failing on any other ground, has been instituted too late, and I cannot give a voice for disturbing Vice-Chancellor WOOD's order of dismissal. It seems to me that the appellant should pay the costs of the appeal. But I have no objection to add that the dismissal is to be without prejudice to any bill for redemption, if it shall be desired, though I know not that such an addition can be material. Nor, as I have said, do I object to a declaration being made concerning the 15*l.* Of course if the parties to the cause will consent to a present decree for redemption it can be made.

* THE LORD JUSTICE TURNER.—This is a bill filed by the * 627 plaintiff against his late solicitor, praying, in effect, to open accounts which have been settled between them,—for the taxation of bills of costs which have been secured by a mortgage,—and that the mortgage may stand as a security only for what may be due upon the balance of the accounts, or at all events after the taxation of the bills of costs.

The circumstances of the case are peculiar. The plaintiff and his father became the clients of the defendant Routh in the year 1844. They were engaged in heavy chancery suits, and the defendant Routh, with the full knowledge of the plaintiff, conducted these suits through the medium of Messrs. Westmacott as his agents. In the year 1848 it was deemed advisable to take the business of these suits out of the hands of Messrs. Westmacott and place it in the hands of the defendant Routh, and this was accordingly done with the knowledge, if not at the instance of the plaintiff. In consequence of this proceeding it of course became necessary to pay Messrs. Westmacott's bills, and in the month of March, 1848, the defendant Routh satisfied Messrs. Westmacott for their share of the bills by payment of 400*l.* in cash, and by a promissory note for the balance bearing interest at 5*l.* per cent. The remainder of these bills belonged to the defendant Routh as

principal in the business. The defendant Routh had then also demands against the plaintiff and his father for payments which he had made, and business which he had transacted on their account, including, as it would appear from the evidence in this case, some charges for business which he had transacted in the suits in which Westmacotts had acted as his agents. On or before the 16th of March, 1848, an account was made out of what * 628 was * then claimed to be due from the plaintiff and his father to the defendant Routh, and this account was signed by the plaintiff and his father.

This account was followed by the mortgage which is in question in this suit, and which was made by indenture dated the 16th of March, 1848.

By this deed the plaintiff and his father conveyed some estates to the defendant Routh by way of mortgage for securing the 2542*l.* 7*s.* 11*d.* mentioned in the account, with a proviso for redemption on payment of the amount secured, with interest at 5*l.* per cent, on the 16th of September, 1848. The plaintiff and his father, however, were only entitled to the mortgaged estates, subject to a prior life-interest in Colonel Blgrave, and to limitations in favour of his first and other sons in tail male, and consequently it was agreed that the interest secured by the mortgage should not be demanded till after Colonel Blgrave's death. A memorandum of this agreement was accordingly indorsed on the mortgage-deed.

It would appear from the evidence in the cause that sometime before the execution of this mortgage the defendant had received a sum of 155*l.*, which might have been applied towards payment of the sums mentioned in the account and secured by the mortgage, but there is conflicting evidence upon the question whether there was not an agreement that this sum should be credited against the mortgage when paid, the defendant alleging and the plaintiff denying that there was such an agreement. The plaintiff, however, clearly knew, soon after the mortgage had been executed, that this sum had been received by the defendant. After the execution of the mortgage the defendant continued to act as * 629 the * plaintiff's solicitor until the month of August, 1852, and in the month of October, 1848, he delivered to the plaintiff the bills of costs referred to in the account. From the bills so delivered, it appears that Messrs. Westmacott's costs which had been entered in the account at 1409*l.* 9*s.* 10*d.* in fact

amounted to 1419*l.* 9*s.* 10*d.*, and that the defendant's charges entered in the account at 735*l.* 5*s.* 1*d.* amounted to 854*l.* 16*s.* 5*d.* In the month of July, 1850, the plaintiff was furnished with a copy of the mortgage-deed. Upon the defendant ceasing to be the plaintiff's solicitor in August, 1852, litigation arose between the parties, the defendant filed a claim to foreclose other mortgages which had been made to him by the plaintiff, and the plaintiff obtained an order to tax the defendant's bills of costs subsequent to the mortgage. It is in evidence that on the occasion of this order to tax being made, an offer was made on the part of the defendant to include in the taxation the costs secured by the mortgage upon the plaintiff's giving the usual undertaking, and that this offer was declined on the part of the plaintiff. The bill in this cause was filed on the 19th of May, 1854.

Upon the hearing of the cause the Vice-Chancellor Sir W. P. Wood dismissed the bill with costs. The appeal before us is from that dismissal. In deciding this appeal it is plainly unnecessary to refer to the case of pressure, alleged by the bill, for the plaintiff has wholly failed in proving that part of his case. It is only necessary, therefore, to look to the other allegations of the bill, which are, in substance, these: that the bill of costs had not been delivered, and that the relation of the solicitor and client was subsisting when the mortgage was made; that a large portion of the costs was unnecessarily and improperly incurred; and that the accounts and bills of costs were so confused and intricate * that the errors could not be detected. It is upon * 630 these allegations the plaintiff's case must rest, and with respect to two of them it is unnecessary to say more than a few words. It is idle to allege that these accounts were confused, for the account settled on the 16th of March most plainly showed for what sums and on what account the mortgage was to be made, and it is not less idle to allege intricacy and confusion in the bills of costs as a ground for impeaching the mortgage when those bills of costs had not been delivered at the time when the mortgage was made. Again as to the allegation that a large portion of the costs had been unnecessarily incurred, it is much too loose and general for the Court to act upon. How could such an allegation possibly be met by evidence? To hold that the Court would act-upon such an allegation would be, in truth, to hold that no mortgage for

costs could be supported without proof that every item in the bill of costs was necessary and proper.

The case, therefore, must stand or fall upon the ground that the bills of costs had not been delivered, and that the relation of solicitor and client subsisted when the mortgage was executed, and this, no doubt, is a question of great importance. It is unnecessary to say what has been so repeatedly said, that this Court watches transactions between solicitor and client with great jealousy;¹ or to say that that jealousy certainly ought not be relaxed where security has been taken from the client without his having been made acquainted with the particulars of the demand against him. But although such a transaction must be viewed with the utmost jealousy, I am not aware that the Court has ever held, and I am not prepared to hold, that when that jealousy had been exercised and the Court has been satisfied that the transaction * 681 was fair and reasonable, and that no undue * advantage has been taken in it, the transaction cannot be supported.

This point came before Lord LANGDALE in *Jones v. Roberts*, (a) where it appears that the bills delivered were not perfect, and that some of the business transacted was not at all included in them, and yet Lord LANGDALE declined to go to the length contended for in the case. Whether such a transaction is to be supported or not must, I think, depend upon the circumstances of each case, and looking in this case to the circumstances which led to the mortgage, to the length of time since the bills were delivered, to the period which has elapsed since the relation of solicitor and client was determined, to the offer which was made upon the occasion of the order for taxation, and to the refusal of that offer, to the payment under that order, and (as I presume) the consequent delivery of the documents in the defendant's possession, I think that if the case rested on these facts alone there would be strong ground to contend that it would be the duty of this Court to uphold the mortgage. But the case does not rest on these facts

(a) 9 Beav. 419.

¹ See 1 Dart V. & P. (4th Eng. ed.) 32-34; 2 Sugden V. & P. (8th Am. ed.) 689, 690; *Starr v. Vanderheyden*, 9 John. 253; *Miles v. Ervin*, 1 M'Cord Ch. 524; *Phelps v. Overton*, 4 Hayw. 292; *Downing v. Major*, 2 Dana, 228; *Hatch v. Hatch*, 9 Ves. (Sumner's ed.) 292, n. (c); *Rose v. Mynott*, 7 Yerger, 30.

alone. There are, I think, clearer grounds for upholding this mortgage. This plaintiff permitted the defendant to go on in the transaction of his business for a period of nearly four years after the delivery of the bills, upon the faith that the mortgage would not be disputed, and for six years and upwards before the filing of this bill the plaintiff has taken the benefit reserved to him by the memorandum, on the condition that the interest should not be required, and has enjoyed an immunity from suit by reason of that condition. Under such circumstances I think that it would be most unjust to allow * him now to question the mort- * 682
gage, and I am of opinion, therefore, that this bill was properly dismissed.

Much was said in the course of the argument, on the question of the necessity of alleging specific errors for the purpose of opening or surcharging and falsifying an account between solicitor and client, and with reference to the case of *Lawless v. Mansfield*, I have always understood the rule of the Court, with reference to opening or surcharging and falsifying accounts, to be this, that to open an account fraud must be shown ; to surcharge and falsify it errors must be alleged and proved ;¹ and whether it be so or not in the case of a money account between solicitor and client, — which was the point under Lord St. LEONARDS'S consideration in *Lawless v. Mansfield*, and which I leave wholly untouched, as it is not necessary here to decide it, — I think that what was said in that case was not meant to apply, and cannot apply, to a mortgage for bills of costs only. To apply what was said in that case to such a mortgage, would be in effect to hold that, on a mere general allegation of errors, it would be incumbent on the solicitor to prove every item in the bills of costs.

It appears by the evidence, and was admitted at the bar on the part of the defendant, that credit was to be given against the mortgage for the sum of 155*l.*, to which I have referred, and I think, therefore, the defendant should undertake by the decree to give credit for that sum accordingly, but I do not find any allegation in the bill upon this subject, and this, therefore, will make no difference as to the costs. The appeal must be dismissed with costs.

¹ See *Allfrey v. Allfrey*, 1 Mac. & G. 87, 93, and notes ; *Coleman v. Mellesher*, 2 Mac. & G. 309, 314.

1856. November 17, 25. Before the LORDS JUSTICES.

A testatrix devised a specified estate to trustees in trust for her niece and the niece's children (provided she took "the name of Cranmer and arms, and her children") with the testatrix's mansion-house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, the India cabinet and striking watch, the testatrix's diamond ear-rings and pins as heirlooms, with the testatrix's estate; and the testatrix gave her residuary real estate to the niece, her heirs and assigns for ever. The niece had, to the testatrix's knowledge, at the date of the will, several children, some of whom survived the testatrix: *Held*, that the niece took an estate tail.

Held, also, that where some of the parties interested in the construction of a purely legal devise are infants, the Court cannot at the request of the parties make a declaratory decree as to their rights under such a devise.¹

THIS was an appeal from a decision of Vice-Chancellor Wood, holding that the respondent Alfred Molyneux Byng took under the will of Ann Cranmer, the testatrix in the cause (as heir of the body of his mother), an estate tail.

The will was made in 1844, and was all in the testatrix's own handwriting. It was as follows: "If it should please God to take me without leaving another will, I desire this may stand good. I request to be buried in Quendon churchyard as near my dear brother as can be, a brick vault like his for two or three coffins and enclosed with iron railing. I wish as little expense for my funeral as propriety will admit of, and my name added to the tablet I have put up for my dear husband. I give to my brother Henry Webb my farm called Collins in Aythrop Roothing and High Easher, and my two houses in Golden Square, St. James's, but if he does not marry and leave children, then to go with my estate. I charge my personal property with 100*l.* a year to each of my sisters Mrs. Elizabeth Birch and Mary Webb for their life, to be paid half yearly, and also to Mrs. Webb, my brother's widow, 100*l.* a year for her life, from the dividends in my 3*l.* per cent consolidated bank annuities. I give to my great-nephew

* 634 Henry Webb Byng the livings of * Quendon and Chickney, should he like the profession and be qualified for them, or

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1001.

to William Cranmer Byng. I give to George Morinsey Gray, Esq., the two houses left me by my dear husband next each other in Wardour Street and Peter's Street, St. James's. I give in trust to my executors for my niece Mary Anne Byng and her children all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, the India cabinet in drawing-room, and striking watch, and my diamond ear-rings and pins, as heirlooms with my estate. I also give to my niece Mary Anne Byng my fee-farm rent Northborne Court, near Deal, Kent, and my Snow Hill property, London, of which I have only one-third, if I have not disposed of it, which I wish to do." After bequeathing pecuniary legacies, the will concluded as follows: "I request my brother Henry Webb, Esq., will act as my executor, and Mr. John Windus to assist him, and hope they will accept 200*l.* each for any trouble they may have. I give to Henry Byng, Esq., my niece's husband, 500*l.* from my 3*l.* per cent bank consols, and to my godson William Cranmer Byng 500*l.*, and also all the rest, residue, and remainder of my real estate [and my personal property] of what nature or kind soever, not before by me given or bequeathed unto my niece Mary Anne Byng, her heirs and assigns, for ever." The words in brackets were interlined without attestation in the will, and were omitted from the probate.

The testatrix died in June, 1858. Mary Anne Byng, who had several children living at the date of the will, died in the lifetime of the testatrix, leaving eight children, all of whom survived the testatrix; but William Cranmer Byng, named in the will, died in his mother's *lifetime. The respondent Alfred *635 Molyneux Byng was her eldest son. The Vice-Chancellor held that the gift to Mary Ann Byng and her children gave her an estate tail, and that the Quendon Hall estates were now vested in the respondent Alfred Molyneux Byng as tenant in tail. The Vice-Chancellor considered that the Court had no jurisdiction to decide upon the construction of the will as to the advowsons, the disposition of them being a merely legal devise; but, at the request of the parties, his Honor gave his opinion that the gift to Henry Webb Byng was of a single presentation only, and a declaration to that effect was contained in the decree, from which the younger

children appealed. The case is reported in Messrs. Kay and Johnson's Reports. (a)

Mr. Rolt and *Mr. G. L. Russell*, in support of the appeal.— There are two constructions of the devise of the Quendon Hall estates favourable to the appellants, either of which is more probably correct than that adopted by the decree; for, in the first place, the devise may be construed as giving the fee-simple to the mother and her children as joint tenants, or, secondly, it might be construed as giving an estate for life to the mother, with remainder in fee to the children. If there was no context explaining the gift, the former would be clearly the proper construction, the devisee having children living at the date of the will, and the other provisions of the will strengthening instead of controlling this construction. For the parent and children are all to take the prescribed name and arms, and the gift of the heirlooms, on which the Vice-Chancellor partly founded his decision, is consistent with their being enjoyed by the mother and children

* 636 together. The difficulty * is one which would arise on the ordinary form of strict settlement. According to his Honour's decree, all the younger children are excluded, though they are the object of the testatrix's bounty. The word "children" is one of purchase, not of limitation, in its ordinary sense. *Buffer v. Bradford*, (b) *Wild's Case*, (c) *Oates v. Jackson*. (d) But if the Court should hold that the clauses as to the name and arms and heirlooms control the ordinary import of the words, then we submit that the construction, which would give the mother a life estate with remainder to the children in fee, would give the ordinary operation to the name and arms clause, and avoid the difficulty as to the gift of the heirlooms, and be more in accordance with the testatrix's intention than the construction adopted by the Vice-Chancellor. There was no object in giving the estate to trustees, if the intention was to create an estate tail. The intention must have been to preserve the property for a succession of takers. The construction adopted by the Vice-Chancellor would have produced a lapse but for the late Wills Act. The gift of the residue to Mrs. Byng, her heirs and assigns, shows that the testatrix knew

(a) Vol. II. p. 669.

(c) 6 Rep. 16 a.

(b) 2 Atk. 220.

(d) 2 Str. 1172.

how to give an estate of inheritance when she so intended. *Jeffrey v. Honeywood*, (a) *Vaughan v. Marquis of Headfort*. (b) As to the advowsons, the first gift is of the livings, and the words relied upon as cutting down the gift are not equally clear.

They referred to *Pocock v. Bishop of Lincoln*. (c)

Mr. Cairns and *Mr. Thring*, for the eldest son. — The word “children” may be a word either of limitation or of purchase. *Buffer v. Bradford*. (d) *Wild's Case* (e) is to the same effect. These authorities only decide that *the word is *637 *prima facie* one of purchase, but may be a word of limitation.

Jeffrey v. Honeywood (a) does not apply, and if it did it has been disapproved of in *Broadhurst v. Morris*. (g) The declaration of trust negatives the idea of joint tenancy, and points to succession. The intention that the estate should not be divided is evidenced by the clauses as to the name and arms. With respect to the argument that a similar difficulty occurs in the ordinary form of strict settlement, in which it is usual to limit the estate to the daughters as tenants in common after the determination of the estates given to the sons, that is differently provided for in different settlements, and in ordinary settlements the leading object is to vest the estate in one person at once, and it is considered unnecessary to provide for a difficulty which is not likely to arise.

They referred to *Doe v. Davies*, (h) *Wood v. Barron*, (i) *Doe v. Bradley*, (k) *Snowball v. Proctor*, (l) *Vaughan v. Marquis of Headfort*. (b)

[*Mr. Lee, amicus curiæ*, referred to *Mellish v. Mellish*. (m)]

Mr. G. L. Russell, in reply. — The heirlooms are to go with the mansion-house, so that if the estates are partitioned they can follow that destination.

(a) 4 Madd. 398.

(b) 10 Sim. 639.

(c) 3 Bro. & B. 44.

(d) 2 Atk. 220.

(e) 6 Rep. 16 a.

(g) 2 B. & Ad. 1.

(h) 4 B. & Ad. 43.

(i) 1 East, 259.

(k) 16 East, 399.

(l) 2 Y. & C. C. C. 478.

(m) 2 B. & C. 520.

He referred to *Mason v. Clarke. (a)*

Judgment reserved.

November 25.

* 638 * THE LORD JUSTICE KNIGHT BRUCE. — In this case I continue to entertain the opinion expressed here early in the last week, that the Court is without jurisdiction or cannot properly exercise jurisdiction in the present cause on the question of the construction of Mrs. Cranmer's will, so far as it relates to what the testatrix has called "the livings of Quendon and Chickney." The declaration, therefore, on that subject contained in the decree or order under appeal should, I think, be omitted, — of course without prejudice to any right. The Vice-Chancellor no doubt was induced to decide the point by the wish of the counsel on each side that he would do so. I cannot, however, for myself consent to take that course.

The other portion of the controversy, the dispute as to the meaning and effect of the devise of the Quendon Hall estate or Quendon Hall estates, seems to me of great difficulty. Perhaps the devise is void for uncertainty. If it is so, the appellants can derive little or no advantage from the circumstance, inasmuch as the respondent, the eldest son and heir of the testatrix's niece Mrs. Byng, who died in the testatrix's lifetime, became also on the death of the testatrix her heir-at-law. The inclination of my opinion, however, though with much doubt and hesitation, is that, notwithstanding the fact of Mrs. Byng having, to the knowledge of the testatrix when the will was made, several children then living, that lady was, according to the true construction, made by it tenant in tail of the Quendon Hall estate or Quendon Hall estates. And the Vice-Chancellor having taken that view of the devise, of course I cannot give a voice for varying so far the decree or order before us.

I am (I repeat) not persuaded that the will makes Mrs.

* 639 * Byng a tenant for life, or shows an intention that she should be a joint tenant with her children.

THE LORD JUSTICE TURNER. — I entirely agree with my learned brother that it would not be right for us to give any opinion as to

(a) 17 Jur. 479.

the effect of the devise of the livings. The devise is purely legal, and it is for a Court of Law to determine the rights of the parties. This Court ought not, I think, to give an opinion which may prejudice those rights, where the parties, being infants, cannot agree to be bound by its decision. I think, therefore, that this part of the decree had better be struck out.

With respect to the Quendon Hall estate, I have rarely, if ever, met with a will more difficult to be construed; but two things seem to me to be clear, that Mary Ann Byng was the principal object of the testatrix's bounty and that the testatrix regarded the Quendon Hall estate as a family estate, the estate in connection with which the name of Cranmer was to be perpetuated. The former of these propositions appears to me to be proved by the other dispositions of the will, the latter by the provisions as to the name and arms and as to the heirlooms. Both these considerations seem to me to lead to the conclusion that the testatrix intended the children of Mary Ann Byng to take through her, and not with her or in remainder in their own right after her decease; and for this reason, coupled with the reasons which the Vice-Chancellor has assigned, I think by far the better opinion is, that the conclusion at which he has arrived is correct. I am the more inclined to that opinion, because I think that the words "and her children" are thrown in in this will in a manner indicating that the children were not contemplated as taking *imme- * 640 diate estates. This seems to me to be especially the case in the name and arms clause. It would surely be a strange intention to impute to the testatrix that Mary Ann Byng was not to take if her children, who must have been known to the testatrix to be infants, did not take the name and arms. And with respect to the children taking in remainder, the same observation applies. Could the testatrix intend that none of the children should take if any of them refused to take the name and arms? The case was very ably argued on the part of the appellant upon the ground that all the children were objects of the testatrix's bounty, and that all were to take the name and arms; but the arguments failed to satisfy my mind as to the mode in which the children were to take and as to the time when they were to assume the name and arms; and upon consideration they have not appeared to me to be reconcilable with the paramount intention of the testatrix.

Upon the whole, therefore, I think this appeal must be dismissed ; but I think the costs of all parties ought to be paid out of the estate.

* 641

* WINTOUR v. CLIFTON.

1856. November 6, 12, 18. December 9, 15. Before the LORDS JUSTICES.

In determining what are cases of election, although a testator must be taken *prima facie* to have intended to dispose only of what belongs to him, there is no such rule as that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made clear by any thing short of positive declaration. The context of the will and the aptitude of the testamentary limitations to the testator's interest ought to be regarded.¹

Therefore where a testator limited estates of which he could dispose of the ultimate reversion only, together with estates of which he was seised in fee in possession, and the limitations of both corresponded to some extent with the limitations which as to the former property already existed and preceded the reversion, and the will contained a power of jointuring which was to come into operation when the tenants for life came into possession of all the devised estates, including those of which the testator had only the reversion after the estates for life: *Held*, that the testator must have intended to dispose of the whole interest and not merely the reversion, and that a case of election was raised.²

THIS was an appeal from a decree of the Master of the Rolls declaring the appellant Sir Robert Juckes Clifton bound to elect to take under or against the will of Sir Robert Clifton.

The testator was at the date of his will and down to the time of his death seised in fee-simple, 1st, of the manors of Clifton and Glapton, and of some lands in the parishes of Clifton and Glapton to which he had become entitled under the settlement made upon

¹ See 1 Jarman Wills (3d Eng. ed.), 429, 628-631.

² See *Smith v. Smith*, 14 Gray, 532; *Hyde v. Baldwin*, 17 Pick. 308; *Smith v. Guild*, 34 Maine, 443; *Hamblett v. Hamblett*, 6 N. H. 333; *Fulton v. Moore*, 25 Penn. St. 468; *Barrow v. Barrow*, 4 K. & J. 409; 2 Story Eq. Jur. §§ 1075, 1077 *et seq.*; *Weeks v. Patten*, 18 Maine, 42; 1 Jarman Wills (4th Am. ed.), 383 *et seq.* and notes; (3d Eng. ed.) 415 *et seq.*, 429; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Thellusson v. Woodford*, 13 Ves. 209; *Usticke v. Peters*, 4 K. & J. 437; *Grissell v. Swinhoe*, L. R. 7 Eq. 291.

the marriage of his father Sir Gervas Clifton, and under a recovery which he had suffered of these manors and lands; 2dly, of the advowsons of Clifton and Wilford which had been devised to him by the will of his father; and, 3dly, of some lands in Wilford and an estate in Barton which he had himself purchased or acquired. He was also, at the date of his will and at the time of his death tenant for life under the will of his father Sir G. Clifton, 1st, of a mansion-house called Clifton Hall, in the parish of Clifton, and of some demesne and other lands and hereditaments in that parish which appeared * to have been usually held with the * 642 mansion-house, and which had been excepted from Sir Gervas's marriage settlement; 2dly, of the manor of Wilford and some lands in Wilford which by Sir Gervas's marriage settlement had been limited to him in fee, subject to a term for securing his wife's jointure and portions for his younger children; and, 3dly, of the household goods, furniture, and fixtures, and some plate and other articles in the mansion-house of Clifton Hall which by Sir Gervas's will had been directed to go as heirlooms with his devised estates. He was further entitled at the date of his will and at the time of his death, under an ultimate limitation contained in Sir Gervas's will in favour of his own right heirs, to the reversion in fee of the estates and the absolute interest in the chattels of which he was tenant for life, this reversion being expectant on the determination of his own life-interest and of a long series of subsequent limitations in favour, first, of his brother Sir Jukes Clifton for life, and of his first and other sons in tail male, and then of various other members of his family and their first and other sons in succession. He was also possessed of large personal estate.

Being thus seised and possessed, he made his will, dated the 7th of December, 1832, by which he devised in these terms: "I give and devise all those my manors or lordships, or reputed manors or lordships of Clifton-cum-Glapton and Wilford, otherwise Wilford, in the said county of Nottingham, and the advowson of the churches of Clifton and Wilford in the same county; and also all that my capital messuage or mansion-house called Clifton Hall, and all and every my messuages, farms, lands, and hereditaments in the several parishes of Clifton, and Wilford and Chilwell-cum-Attenborough, in the said county of Nottingham, and usu-

* 643 ally called the * Clifton estate, with their rights, royalties, members, and appurtenances, to the uses hereinafter declared."

Then followed the declaration of uses, which were to Sir. J. Clifton for life, without impeachment of waste ; and after his death to Sir R. J. Clifton for life, without impeachment of waste, with remainder to the first and other sons of Sir R. J. Clifton in tail male, with remainder to the second and other sons of Sir J. Clifton in tail male, with divers remainders over, under which the defendant Mr. Henry Robert Markham was the first tenant in tail now *in esse*. He then devised the Barton estate to his brother Sir Arthur B. Clifton for life, with remainder to his first and other sons in tail male, with like remainders to Sir J. Clifton and Sir R. J. Clifton and his issue as were thereinbefore contained with reference to the Clifton and Wilford estates. The ordinary limitations to preserve the various contingent remainders above mentioned were made to two trustees named Moore and Westcomb.

The will contained a proviso requiring the several persons who should become entitled to the possession or receipt of the rents and profits of the hereditaments by virtue of the limitations thereinbefore contained, and the husbands of such of them as should be females, as and when they should respectively come into possession of the same, to assume and bear and obtain authority as therein mentioned to use the surname and arms of Cranmer only, or to quarter the said arms with their family arms.

There was a power of jointuring in these terms : " And I hereby authorize and empower my said brother Jukes Granville Clifton Jukes and Sir Arthur Benjamin Clifton, and my

* 644 said nephews Robert Clifton * Jukes and Henry Spencer Markham, as and when they respectively shall be in the actual possession of or entitled to the receipt of the rents and profits of my said manors, hereditaments, and premises in the parishes of Clifton-cum-Glaption, Wilford, and Chilwell-cum-Attenborough aforesaid, by virtue of the limitations hereinbefore contained (either before or after their intermarriage), by any deed or deeds, instrument or instruments in writing, to be duly executed in the presence of and to be attested by two or more witnesses, or by their respective last wills and testaments in writing, to be respectively signed and published in the presence of and attested by

three or more witnesses, to grant, limit, and appoint to and for the use of any woman or women with whom they shall respectively intermarry, for the life or lives of such woman or women, in full or in part only of her or their jointure or jointures, and in bar or without being in bar of her or their dower, to take effect immediately after the decease of my brothers and nephews respectively, any annual sum or yearly rent-charge not exceeding in the whole, for any such woman, the yearly sum of 800*l.*, to be issuing out of and to be charged upon all or any part of the said hereditaments and premises in the parishes of Clifton, Wilford, and Chilwell-cum-Attenborough, hereinbefore devised, except my said capital messuage or mansion-house called Clifton Hall, and the other demesne lands, with such powers and remedies for recovering such annual sum or sums, yearly rent-charge or yearly rent-charges, when in arrear, as are usual in such cases." And there was a power to create a term for the purpose of securing a jointure.

The testator then bequeathed as follows: "I give and bequeath all such plate, linen, china, books, pictures, prints, drawings, furniture, wines, and other liquors and articles of domestic use or ornament as may be in or *about my said capital mes- *645 suage or mansion-house called Clifton Hall, and the offices thereto belonging, at the time of my decease."

The testator bequeathed the residue of his personal estate to the same trustees, upon trust to invest the proceeds in land, to be settled to the same uses as those limited by the will with respect to the manors of Clifton and Wilford, and the messuages, farms, and hereditaments in Clifton, Wilford, and Chilwell-cum-Attenborough, called the Clifton estate. And the testator appointed Sir J. Clifton and Sir A. B. Clifton and Messrs. Moore and Westcomb, executors of his will, and gave a power of appointing new trustees.

The testator died in April, 1837. The plaintiffs were the existing trustees of the will.

Sir R. J. Clifton, the appellant, who was the principal defendant, was the eldest son of Sir J. Clifton, and on the death of Sir R. Clifton became tenant in tail of the estates and property of which Sir Robert had been tenant for life; and the estate tail having been barred by him, the question was, whether he and other defendants who claimed under him were entitled to take the benefit of the dispositions made by Sir R. Clifton's will of his own real

and personal estate, without subjecting to those dispositions their own interests in the property of which Sir R. Clifton had only an estate for life with an ultimate reversion.

Mr. Rolt, Mr. Selwyn, and Mr. Jones Bateman, in support of the appeal.—The Master of the Rolls decided the case on the balance of probabilities, whereas we submit that a case of * 646 * election can only arise where a testator has clearly given what is not his. *Church v. Mundy*. (a) That authority has been always followed. *Ford v. Ford*. (b) Assuming the reversion to pass under the devise, can the Court go further, and say that there is plain demonstration from the inaptitude of the limitations that the other property should pass? There must be not merely incongruity, but absurdity, in applying the limitations to the testator's own interest before you can apply them to interests which the testator had no right to dispose of. *Doe v. Martyn*, (c) *Dillon v. Parker*. (d) Sir E. SUDGEN (e) doubts whether a case of election can be raised where the testator has a limited interest in the estate devised beyond that interest. *Lord Raneliffe v. Parkyns*, (g) *Welby v. Welby*. (h) But here all the limitations can be applied to the property to which the testator was entitled.

They also referred to *Bootle v. Blundell*, (i) *Warbulton v. Warbulton*, (k) *Parker v. Carter*, (l) *Parker v. Sowerby*, (m) *Hicks v. Sallitt*, (n) *Mayor of Faversham v. Ryder*, (o) *Evans v. Evans*, (p) *Napier v. Napier*, (q) *Wilkinson v. Adam*, (r) *Gill v. Shelley*. (s)

Mr. Bagshawe and Mr. J. H. Palmer, for Mr. Markham, the first tenant in tail.

Mr. Lloyd and Mr. C. Browne, for the plaintiffs.

- | | |
|--|-------------------------|
| (a) 12 Ves. 426; 15 Ves. 396. | (c) 4 B. & Ad. 771. |
| (b) 6 Hare, 486. | |
| (d) 1 Swanst. 359; 7 Bli. (N. S.) 325. | |
| (e) Sugd. H. of Lords Decisions, 448. | |
| (g) 6 Dow. 149. | (k) 2 Sim. & Giff. 163. |
| (h) 2 Ves. & B. 187. | (l) 4 Hare, 400. |
| (i) 1 Mer. 219. | |
| (m) 1 Drew. 488; 4 De G., M. & G. 321. | |
| (n) 3 De G., M. & G. 782. | (q) 1 Sim. 28. |
| (o) 5 De G., M. & G. 350. | (r) 1 Ves. & B. 422. |
| (p) 3 W. R. 614. | (s) 2 R. & My. 386. |

* *Mr. Roundell Palmer, Mr. Lee, Mr. Follett, Mr. Greene,* * 647
Mr. Kenyon, Mr. Osborne, Mr. Shapter, Mr. Southgate, Mr.
Druce, and Mr. Bathurst, for other respondents.

Mr. Rolt, in reply.

Judgment reserved.

THE LORD JUSTICE KNIGHT BRUCE. — As it does not seem in the least degree probable that the will of Sir Gervas Clifton or the nature of Sir Robert Clifton's title to the bulk of his settled and unsettled property, was unknown to each of the professional gentlemen concerned for Sir Robert Clifton in the preparation and completion of his will, or that the instructions of Sir Robert were to compose for him such a testamentary document as should be sure or almost sure to throw his successors into confusion and chancery, it cannot but be a cause of wonder (to say no more), that such a will as the will before us should have been prepared for him. I think, however, the difficulty created by it more apparent than real. The matter is not inextricably perplexed, not irremediably confounded. Having attentively read the will under the light afforded by such extrinsic evidence as has not, nor consistently with established rules could have been denied to be admissible, I agree in the main, if not wholly, with the reasoning and observations contained in the able judgment of the Master of the Rolls, and am satisfied that the will of Sir Robert Clifton exhibits and demonstrates an intention upon the part of the testator that all the estates in the parishes of Clifton, Wilford, and Chilwell-cum-Attenborough, or in any one or more of those parishes, of * which he was tenant for life under the will of * 648 Sir G. Clifton, and all the estates in those three parishes, or in any one or more of them; of which Sir Robert was the absolute owner, should from his death be held as one property, and enjoyed together according to the limitations and in the manner set forth in his will, not that, so far as the estates settled independently of his will were concerned, the reversion or remainder in fee in those estates to which he was entitled, and which was strictly devisable by him, should alone be affected by it. Accordingly the decree appears to me substantially right and the appeal unfounded, a conclusion at which of course I should not have arrived had I thought

the appellant's case supported by the authority of *Lord Ranelagh v. Parkyns*, decided by the House of Lords. That decision and the decision now under appeal seem to me well consistent with each other.

It is right, however, now to add, that in what I have said I have been dealing with this controversy upon the supposition that the words "and usually called the Clifton estate," and the phrase "called the Clifton estate," contained in Sir Robert's will are immaterial. But I have not meant to declare or intimate any opinion whether they are material or immaterial. If they are material, they only thus far qualify, only thus far affect, the opinion that I have given, namely: It may be that there is or are land, or other hereditaments in the parishes of Clifton, Wilford, and Chilwell-cum-Attenborough, or in some or one of them, which, when the will was made, the property then called or usually called the Clifton estate did not comprise. In that event it may be that as to the whole or part of the land or hereditaments, so not comprised in what was then called or usually called the Clifton estate, neither was there

any devise by Sir R. Clifton, nor did he put any devisee to
 * 649 elect. Upon * this particular and limited question we are both, I believe, willing to hear further argument. But as to the meaning and operation of Sir R. Clifton's will with respect to the manor of Wilford, the mansion-house of Clifton Hall, and all such hereditaments in each or any one or more of the three parishes already mentioned as were, when the will was made, comprised in the property then called, or then usually called, the Clifton estate, the framer of the instrument has certainly not disabled us from interpreting it without further assistance. Still it seems to me, I repeat, scarcely conceivable how a man in Sir R. Clifton's position, surrounded by legal aid, of which he availed himself, should have left behind him the almost enigmatical document which has almost necessarily produced the present litigation.

THE LORD JUSTICE TURNER. — This raises a question of election, and that question depends wholly upon the construction to be put upon the will of the late Sir R. Clifton. [His Lordship stated the facts and the contents of the will nearly in the words of the above statement, and proceeded as follows:] It was not denied on the part of the appellant that he and the other defendants claiming under him must be bound to elect if the will of Sir R. Clifton was

to be construed as disposing of the immediate and entire free and absolute interest in the estates and property of which Sir R. Clifton was tenant for life, and not merely of the ultimate reversion which he had in such estates and property. But it was argued on their behalf that, upon the true construction of Sir R. Clifton's will, it affected his reversion only. That every testator must *primâ facie* be taken to have intended to dispose only of the interest which he may have been entitled to dispose of. That there being property of Sir R. Clifton to answer every * disposition of his will, the Court could not look beyond * 650 that property, and that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made sufficiently clear to raise a case of election by any thing short of positive declaration.

To these two latter propositions I am not prepared to assent. I think that if the words of a will be such as to embrace different subjects, the context of the will may be resorted to for the purpose of ascertaining to which of these subjects the words were intended to apply; and I think that the question in every case upon the construction of a will must be, what was the intention of the testator, and that if the intention can be collected from the context, it is the duty of the Court to give effect to it as much as if it was in terms expressed, and not less so in cases of election than in other cases. The authorities which were referred to on this point, as I understand it, mean no more than to point out forcibly the difficulty there is in raising a case of election where the testator has a limited interest in the property, as to which the election is to be raised; and no doubt there is more difficulty in such cases than in the ordinary case of the disposition of an estate belonging to another person, and in which the testator had no interest, inasmuch as every testator must, as the appellant has contended, *primâ facie* be taken to have intended to dispose only of what he had power to dispose of; and, as in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of.¹

¹ See 1 Jarman Wills (3d Eng. ed.), 426; *Havens v. Sackett*, 15 N. Y. 365.

The question, therefore, in this case, as I view it, is,
 * 651 whether, having regard to what must *prima facie* be * taken
 to have been the intention of the testator, this will does or
 does not evince a clear intention on his part to dispose of what
 undoubtedly he had not power to dispose of, the immediate and
 entire fee and absolute interest in the property of which he was
 tenant for life only. Now the will commences with a devise, in
 which the estates of which the testator had the reversion only are
 thrown into one mass with the estates of which the testator was
 seised in fee, and although this is a circumstance to which no
 weight would be due if the different properties thus thrown
 together were afterwards dissevered, it is not, I think, a circum-
 stance wholly to be disregarded, where, as in the present case,
 there is no such disseverance. I would not, however, be under-
 stood to attach much importance to this circumstance. We come
 then to the limitations of the estates which have thus been amal-
 gamated, and here it is to be observed that these limitations
 correspond to a great extent with the limitations which, under the
 then existing settlement of the property, preceded the reversion
 in fee, so that if the will takes effect upon the reversion only, the
 testator was in fact giving interests to those who already had the
 same interests under a prior title. It is said that this would not
 prevent the reversion from passing under the general words con-
 tained in the will; and it may be admitted that it would not; but
 it is one question whether the reversion would pass, and another
 question whether the will was intended to pass more than the
 reversion. I agree that the inaptitude of limitations may not
 prevent a reversion from passing under general words in a will,
 but I am not prepared to hold that such inaptitude is not to be
 considered in determining whether more than the reversion was
 intended to pass. On the contrary, I think that in such a case the
 inaptitude of the limitations may well be considered, and
 * 652 this appears to me to have * been the opinion of Sir
 WILLIAM GRANT in *Welby v. Welby*. (a)

There is, as it seems to me, this distinction between the ques-
 tions whether the inaptitude of the limitations can be looked at
 with reference to the point whether a reversion passes by general

(a) 2 Ves. & B. 187; [1 Jarman Wills (3d Eng. ed.), 429, 628-631].

words, and the question whether it can be looked at with reference to the point, whether more than the reversion passes, — that in the one case the effect would be to destroy the operation of the previous devise ; in the other it would be only to determine to which of two subjects the devise was intended to apply.

I much doubt, therefore, whether, if this case rested upon the inaptitude of the limitations alone, there would not be sufficient ground to raise a case of election, but I should not think it right to dispose of this case upon that point alone. This will contains a name and arms clause and powers of leasing, jointuring, and charging portions, and also an heirloom clause. With respect to the name and arms' clause, I am not inclined to attach much importance to it, for the provisions of it extend to the case of the devisees coming into possession of any part of the devised estates, but the leasing power contains an exception of the mansion-house and demesne lands, and this, I think, tends to show that the testator considered the immediate interest in the property thus excepted to have passed by the previous devise. We are here met, however, by the language of the power which is clearly distributive, and I think, therefore, no great reliance can be placed on this point either, but then there is the power of jointuring, and this power is given to Sir J. Clifton, to the defendant Sir R. J.

* Clifton, and to the other tenants for life under the will. * 658
[His Lordship read the terms of the power.]

This power, therefore, is to come into operation when these several tenants for life come into possession of all, not of part only, of the devised estates and those who take under the power are to take immediately upon the deaths of the tenants for life, and to have the usual rights and remedies, which would include of course a power of distress, but if the reversion only was devised, none of the persons to whom this power is given could ever come into possession under the limitations of the will. How then could it be the intention of the testator to devise the reversion only ? Similar observations arise upon the power to charge portions, and there is besides the heirloom clause, as to which it is to be observed in addition to what was urged at the bar, that the clause is in these terms : [His Lordship read it.]

Now there must have been in the mansion-house, furniture and other articles, of which the testator was tenant for life under his father's will, and if the bequest is to be construed as extending to

all that was in the mansion, as to which I give no opinion, there would be a clear case of election upon this part of the will. And even if it is not to be so construed, we should be driven to the conclusion that the testator left it open to any tenant in tail under his father's will to denude the mansion of so much of the furniture as had belonged to the father.

Upon the whole of this will, therefore, I am fully satisfied that it was not the intention of this testator to dispose merely of the reversion of the estates of which he was tenant for life, and that a case of election is consequently raised.

* 654 * It was much insisted on the part of the appellant that the testator must be taken to have known the limitations of the estates and that he had only the reversion to dispose of, and that had he intended to dispose of the immediate and entire fee, he would not have left that intention in doubt. But if he has (as I think he has) evinced his intention by the dispositions which he has made, the Court cannot, I think, say that those dispositions shall not take effect because they have not been expressed in terms.

It was also insisted on the part of the appellant, that supposing any case of election to be raised, it would not extend to the lands in Wilford, of which the testator was tenant for life, there being other lands in Wilford of which the testator was seised in fee, to satisfy the devisee. But the observations which I have already made, and particularly those which apply to the powers, seem to me to dispose of that point, if the devise in the testator's will is sufficiently large to embrace the Wilford lands, of which the testator was tenant for life, a point on which I am not altogether clear. Subject to that point, I think this decree must be affirmed.

December 9, 15.

The cause was afterwards spoken to on the minutes, and by the order as finally settled inquiries were directed what estate the testator had, at the date of his will, in the several parishes of Clifton, and Wilford and Chilwell-cum-Attenborough, and for what estate and interest and by what denomination they were known, and whether any and what hereditaments were at the date of the will usually called the Clifton estate; and an inquiry whether any and what part of the plate, furniture, &c., in the mansion-house belonged to the testator.

* In the Matter of DICKSON, Solicitors.

* 655

1856. November 21. December 8. Before the LORDS JUSTICES.

Where a bill of costs against executors contained charges to a considerable extent beyond what would have been allowed them in their accounts with the testator's estate: *Held*, by Lord Justice TURNER, affirming the decision of Vice-Chancellor WOOD, *dissentiente* Lord Justice KNIGHT BRUCE, that it was a proper case of taxation at the instance of the persons beneficially interested after payment by the executors.

THIS was the appeal of solicitors from an order of Vice-Chancellor WOOD directing taxation of their bills of costs after payment.

The petitioners had been employed by the executors of the Rev. C. Perigal, about the winding up of his estate. The principal acting executor was a Mr. Steel, to whom the testator had bequeathed one-third of his residuary estate. The estate was wound up in April, 1856, when Messrs. Dickson sent in to the executors their bills of costs amounting to 251*l.* 13*s.* The executors examined the bills and paid the amount. Mr. Pilleau, to whom the testator had bequeathed the other two-thirds of his residuary estate, considered the bills excessive, and, after they had been paid, presented a petition under 6 & 7 Vict. c. 73, §§ 38, 39, for their taxation. No case of pressure or fraud was alleged, the petitioner relying solely on the ground that the bills contained items of overcharge to a serious amount, and of such a nature that the executors if called upon to pass their accounts in a suit could not have been allowed them in their discharge.

The Vice-Chancellor considered that the petitioner had made out a case entitling him to taxation, which was accordingly ordered, the costs being reserved. From this order Messrs. Dickson appealed, and, in support of the appeal, adduced fresh evidence as to the reasonableness of the items complained of. The admission of this evidence was opposed, but the Court held it admissible.

* *Mr. Swanston and Mr. Osborne Morgan*, for the appellants. — When a client who has paid his solicitor's bill applies for taxation under § 41, it is not enough to show over-

charge; he must show both pressure and overcharge, or else overcharges so gross as to amount to fraud, *i. e.* so excessive that they could not have been honestly made. *Massie v. Drake*, (a) *Horlock v. Smith*, (b) *Re Stirke*, (c) *Re Browne*, (d) *Re Boyle*, (e) *Sayer v. Wagstaff*, (g) S. C. on appeal. (h) When a taxation is ordered on the application of a person who has not employed the solicitor, the taxation is conducted on the same principle as if the person who did employ him had been the applicant, and a charge which is proper as against the employer is allowed on taxation as against the party who has obtained the order. The person who is substantially the person to pay has against the solicitor only the same right as the person who employed the solicitor. So as to obtaining an order to tax, the third party can obtain an order to tax only where the client could. Now here if the client applied, he would have no case, there being no allegation of fraud or pressure, in fact nothing more than this, that the bill is a large bill. There is a total absence of any thing which has ever been considered a special circumstance to take away the effect of payment. *Re Bennett*, (i) *Re Fyson*, (k) *Re Downes*. (l) If the charges are too high, the *cestui que trust* has his remedy against the trustee who pays them, but no right can arise against the solicitor from the fact that the trustee has a right to repay himself out of the fund his costs properly incurred.

Mr. Bacon and *Mr. Shapter*, for the respondent. — *Massie v. Drake* (a) is inapplicable: it was a case before the Act, and the application to tax was made by the parties who had employed the solicitor. In order that there may be taxation after payment, the Act does not say that it is necessary to find pressure and overcharge or overcharges so gross as to amount to fraud: it only requires "special circumstances," such as in the opinion of the Court to make taxation proper. Now a client and a third party stand in very different positions: the client has means of judging of the fairness of the bill and need not pay it at once; the third party often knows nothing about the bill until it has been paid.

(a) 4 Beav. 433.

(b) 2 M. & C. 495.

(c) 11 Beav. 304.

(d) 1 De G., M. & G. 322.

(e) 5 De G., M. & G. 540.

(g) 5 Beav. 415.

(h) 14 L. J. N. S. Ch. 116.

(i) 8 Beav. 467.

(k) 9 Beav. 117.

(l) 5 Beav. 425.

Circumstances then which would not justify taxation on the application of the client may be special circumstances sufficient to justify it on the application of a *cestui que trust*. *Re Lethbridge*. (a) The 41st section enacts, "That the payment of any such bill as aforesaid shall in no case preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve calendar months after payment." It is, we contend, a special circumstance sufficient to justify taxation at the instance of a *cestui que trust*, that a bill contains items which, as between trustee and *cestui que trust*, the trustee would not be justified in paying out of the fund. It is in fact fraud, in the technical sense of the word, * for a solicitor to insert in a * 658 bill against a trustee client, which, as he knows, is to be paid out of the trust estate, charges which, if they were made by another solicitor, it would be his clear duty to advise his client not to pay, inasmuch as they could not be allowed him in passing his accounts. In such a case if the bill has been paid, justice requires that relief should be given to the *cestui que trust* against the solicitor, and that he should not be put to the ruinous course of filing a bill against his trustee for the mere purpose of having the extra costs disallowed.

Mr. Osborne Morgan, in reply.

Judgment reserved.

December 8.

THE LORD JUSTICE TURNER. — This is an appeal from an order of the Vice-Chancellor, Sir WILLIAM PAGE WOOD, directing the taxation of two bills of costs of Messrs. Dickson the appellants. The order to tax was made upon the petition of one of the two residuary legatees of the late Reverend C. Perigal. Messrs. Dickson were the solicitors of the testator's executors, and the bills directed to be taxed are their bills against the executors. They

(a) 18 L. T. 192.

were paid by the executors within a year before the petition for taxation was presented. The petitioner's right to tax these bills rests upon the 38th and 39th sections of 6 & 7 Vict. c. 78, which are as follows:—

Sect. 38. "Be it enacted, that where any person not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained shall be liable to pay, or shall have paid, such bill either to the attorney or solicitor, his executor, * 659 administrator, or * assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued in all respects as if such application was made by the party so chargeable with such bill as aforesaid. Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or Judge to whom such application shall be made, to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application."

The 39th section enacts, "That it shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such Judge shall think fit, and to make such order as such Judge shall think fit for the payment of what may be found due, and of the costs of such reference, to or by such attor-

* 660 ney or solicitor, or the executor, administrator, * or assignee of such attorney or solicitor, by or to the party making such

application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases; and, in exercising such discretion as aforesaid, the said Judge may take into consideration the extent and nature of the interest of the party making the application."

The right, therefore, given by the 38th section to the person liable to pay is only to make such application for taxation as the person chargeable might himself make; and it follows, therefore, first, that if the bills are to be taxed at all they must be taxed as between Messrs. Dickson and the executors; and secondly that, the executors having paid the bills, special circumstances must be shown by the petitioner, as they must have been shown by the executors, to justify the order for taxation. The section indeed provides that any additional special circumstances which may be applicable to the person liable, although not applicable to the person chargeable, may be taken into consideration, but in this case there are no such additional special circumstances. The question therefore is, whether there are such special circumstances in this case as would have warranted an order for taxation at the instance of the executors after payment of the bill. To say that such an order cannot be warranted unless there is pressure or overcharge amounting to fraud is but to repeat what has been constantly laid down. In cases where there has been pressure there is no difficulty, but where there has been no pressure the difficulty is to say what is overcharge amounting to fraud. Lord COTTENHAM, in dealing with this question in *Horlock v. Smith*, (a) has expressed * himself thus: "If the bill has contained * 661 charges which no solicitor dealing properly with his own client would have made, there has always been considered to be fraud within the meaning of the cases upon this subject, and this seems to me to be the correct view of the matter." By this test, therefore, these bills ought, in my opinion, to be tried, and trying them by that test the conclusion at which I have arrived is, that the order for the taxation of them ought to stand. I wholly disclaim the intention of casting any imputation whatever upon these solicitors. I do not doubt that they have charged only what they conceived themselves to be honestly entitled to charge, and I

(a) 2 Myl. & Cr. 495.

regret that this petition should have been presented. But I think that solicitors acting for executors or trustees cannot be said to have dealt properly with their clients if they have charged the executors or trustees to any considerable extent beyond what would be allowed to them in their accounts with the estate which they represent. It is in this point of view, looking to the items in these bills complained of by the petitioner, and to what might be allowed to these executors in account, if a suit was instituted for the administration of this estate, I think this taxation ought to proceed, but I think that the Vice-Chancellor has dealt correctly with the costs by reserving them, and, subject to my learned brother's concurrence, I think the proper order to be made upon this appeal will be to dismiss it, reserving the costs to be dealt with by the Vice-Chancellor with the costs already reserved by him.

THE LORD JUSTICE KNIGHT BRUCE. — This case has come before us on materials, some portions of which were not before the Vice-Chancellor, who possibly might, on the evidence as it stands at present, have dismissed the original petition. That he * 662 * would have done so I do not of course say. I confess myself not satisfied that, in the particular circumstances proved, a taxation is right. But my learned brother being of opinion that the order under appeal should not be disturbed it will stand, which being so, I do not at all object to the costs of the appeal being treated as he proposes.

CLAVERING v. ELLISON.¹

1856. December 2, 11, 13, 15, 16. 1857. January 26. Before the LORDS JUSTICES.

A testator gave real estate to his son's children as tenants in common in tail, and personal estate to them as tenants in common, with an accruer clause on death under twenty-one, and declared that these gifts were upon condition that the son's children were educated in England according to the

¹ Affirmed, see 7 H. L. Cas. 707.

rites of the Church of England, and that if any one or more of them should be educated abroad or not in the Protestant religion according to the rites of the Church of England, the share of such one or more should go to such of the children as were educated in England in the Protestant religion according to the rights of the Church of England, with a gift over if all were educated abroad or not in the Protestant religion according to the rites of the Church of England. The son went to France, and was there detained as a prisoner of war. Of his children, the eldest son and two daughters went to schools in France kept by Roman Catholics, at which, however, a Protestant minister attended. The eldest son, when about fifteen years of age, came to England and completed his education at Harrow and at the military academy at Woolwich. The daughters remained in France till they were sixteen and seventeen years old, when they came to England and went to a Protestant school: *Held*, that the devises and bequests to the eldest son and the daughters were not forfeited.

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor KINDERSLEY, so far as it proceeded on the footing that the plaintiff had not become solely entitled to the real and personal estate of George Clavering.

George Clavering, by will dated the 9th of January, 1798, gave, devised, and bequeathed all his real and personal estate to trustees upon trust to pay the residue of the rents of the real estates, after paying certain annuities, and of the income of his personal estate, to his son Thomas John Clavering, afterwards Sir Thomas * John Clavering, for his life, and after his decease * 663 then, subject as aforesaid, the testator gave his said real estates to the children of his said son, begotten or to be begotten, as tenants in common in tail, with remainders over. And he bequeathed his residuary personal estate, to the children of his said son Thomas John Clavering, begotten and to be begotten, as tenants in common, to be payable at his or their age or respective ages of twenty-one years, with a clause of survivorship in case any of the said children should die under the age of twenty-one years. And the will contained the following proviso:—

“Provided always, and I do hereby declare, that the devises hereinbefore contained to my said son are upon this express condition, that he shall continue to profess the Protestant religion according to the rites of the Church of England during his life, and that he shall not reside abroad more than three calendar months in any one year, and upon this further condition, that his present wife shall within three months next after my decease

renounce the Catholic religion and embrace the Protestant religion according to the rites of the Church of England, and continue to profess the same during the life of my said son ; and in case my said son shall reside more than three months in any year abroad, or shall not continue to profess the Protestant religion according to the rites of the Church of England, or his said wife shall not within the time aforesaid, renounce the Catholic religion and embrace the Protestant religion according to the rites of the Church of England, or having embraced the Protestant religion shall during the life of my said son renounce the same and embrace the Catholic religion, then upon any of the said contingencies so happening, I revoke the said devises so made to my said son, and

declare that my said trustees and their heirs, executors,
* 664 and administrators shall from * thenceforth from time to time during the life of my said son place out the rents and profits of my said real estates, and the interest and proceeds of my said personal estate upon government or real securities for the benefit of all and every the child and children of my said son equally to be divided amongst them share and share alike if more than one, and to be paid and payable at such time and times, and in such manner, and under and subject to the like limitations over as are hereinbefore declared of and concerning my personal estate upon the death of my said son. Provided further, and I do hereby declare, that the devises hereinbefore contained to the children of my said son are made upon this express condition that the children of my said son be educated in England, and in the Protestant religion according to the rites of the Church of England ; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of England, then I do hereby revoke all and every devise to such child or children so educated as aforesaid, and do give, devise, and bequeath the share or shares of such child or children of and in my real and personal estates as aforesaid unto and amongst such other child or children of my said son who shall be educated in England, and in the Protestant religion, according to the rites of the Church of England, as if such child or children so educated abroad, or not professing the Protestant religion according to the rites of the Church of England, was or were actually dead ; and in case all the children of my said son shall be educated abroad, or not in the Protestant religion according to the rites of the

Church of England, then I do hereby give, devise, and bequeath all my said real and personal estates unto and amongst my said nephews and nieces in manner aforesaid, in like manner as if all and every the children of my said son, so educated abroad * or * 665 not in the Protestant religion according to the rites of the Church of England, was or were actually dead under the age of twenty-one years."

The testator afterwards made a codicil dated the 1st of February, 1793, which, so far as is material, was as follows: —

"I do hereby declare that the devises contained in my said will to my son Thomas John Clavering are made upon this further condition, that all the children of my said son shall be educated in England, and in the Protestant religion according to the rites of the Church of England, and in case all or any of the children of my said son Thomas John Clavering shall be educated abroad, or in the Catholic religion, then and in such case I do hereby revoke the said devises contained in my said will to my said son, and I do declare that my trustees named in my said will, their heirs, executors, and administrators, shall from thenceforth from time to time, during the life of my said son, place out the rents and profits of my said real estate, and the proceeds and interest of my said personal estate, upon government or real securities for the benefit of such of the child or children of my said son as shall be educated in England and in the Protestant religion according to the rites of the Church of England, equally to be divided amongst them share and share alike, if more than one, and to be paid and payable at such time and times, and in such manner, and under and subject to the like limitations over, as are declared in and by my said will of and concerning my personal estate upon the death of my said son; and in case all the children of my said son shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England, then I give, devise, and bequeath the same unto the * persons who under my will * 666 shall in such case be entitled to my real and personal estates."

The testator died in the year 1793.

The life-interest of Thomas John Clavering determined soon

after the testator's death, under the proviso in the will, and the income of the testator's real and personal estate was thenceforth accumulated during the life of Sir Thomas John Clavering, who died in 1853. He had some short time before the date of the will intermarried with a French lady, a Roman Catholic. By her he had six children, two of whom died in their infancy. The other children were James Clavering, the eldest son, who attained twenty-one, but afterwards died in his father's lifetime, and whose interests were represented in the suit by the defendant John Clavering; the defendant the Baroness De Knyff; the Baroness De Montfaucon, who also attained twenty-one, married and died in her father's lifetime, and whose interests were represented in the suit by her husband and children, and the plaintiff Sir William Aloysius Clavering.

The circumstances relating to the education of the children were as follows :—

In May, 1802, Sir Thos. J. Clavering went to France, taking with him his four eldest children: James, aged nine; Clara (afterwards Baroness De Knyff) aged eight; Agatha (afterwards Baroness De Montfaucon) aged seven, and Thomas Charles (who afterwards died in infancy), aged five. The appellant, who was only two years old, was left in England, as was also Augustus George, who died in infancy.

In May, 1808, Sir T. J. Clavering was detained in * 667 * France as a prisoner of war under the edict of Napoleon, and he remained in that country till the peace in 1814.

James, while in France, went to French schools conducted by Roman Catholics, but was not compelled to attend Roman Catholic services, nor was he required to receive religious instruction from Roman Catholics, a Protestant minister being allowed to visit the schools. He returned to England in 1808, having been in France six years and a quarter. He then went to Harrow for about a year, and to the Woolwich Military Academy for about another year. After this he remained in England without going to any other place of education, and died without issue in 1824, never having professed himself a Roman Catholic.

Clara was educated from 1802 to 1808 at French schools, at which a Protestant minister was allowed to attend. From 1808 to 1810, she lived with her mother at Paris; in the latter year, she returned to England, and went to school there for about a year,

after which she received no further scholastic education. She went abroad with her mother in 1818, and remained abroad ever afterwards. In 1826, she married the Baron De Knyff, a Roman Catholic, but remained herself a Protestant.

The circumstances as to the Baroness De Montfauçon did not differ in any material particular from those above mentioned as to her sister, except that at or about the time of her marriage she became a Roman Catholic and renounced Protestantism.

The plaintiff, who had been brought up entirely in England, and as a member of the Church of England, * filed * 668 his bill after the death of his father, Sir T. J. Clavering, claiming to be entitled to the whole of the testator's real and personal estate, and of the accumulations derived from it, upon the ground that he the plaintiff was educated in England, and in the Protestant religion, according to the rites of the Church of England, but that the other children of Sir T. J. Clavering were not so educated, and that he the plaintiff, therefore, became entitled to their shares in the real and personal estate and accumulations. Vice-Chancellor KINDERSLEY, before whom the cause was heard, was of opinion that this claim of the plaintiff to the whole of the real and personal estate and accumulations was not well founded, (a) and he accordingly made a decree disposing of the property, according to the rights of the parties considered as unaffected by the provisos contained in the will and codicil. The plaintiff appealed from that decree.

The Attorney-General (Sir R. BETHELL), *Mr. Swanston*, and *Mr. Bazalgette*, for the appellant. — The testator requires every child to fulfil two conditions in order to take under his will: (1) to be educated in England; (2) to be educated in the Protestant religion according to the rites of the Church of England. There is a failure of the gift to any child who does not answer these conditions. The plaintiff is the only child who answers them, and he therefore is entitled to the whole property, the gift in favour of the others failing. *Re Dickson*. (b) If this condition is construed strictly, it requires an education conducted exclusively in England. The gift, then, failing as to those members of the class who do not answer the condition, takes effect for the exclusive benefit of

(a) 3 Drew. 451.

(b) 1 Sim. N. S. 37.

* 669 those who do answer it. * *Clark v. Phillips*, (a) *Harris v.*

Davis. (b) Education according to the rites of the Church of England must involve attendance on the public worship of that church, which the circumstances made impossible. But if the Court should be of opinion that the case turns upon the gift over in case any of the children should be educated abroad, or not in the Protestant religion, the same result will follow. The original condition explains the terms of the gift over. *Walcot v. Botfield*. (c) Such a gift over is good. *Lloyd v. Branton*. (d) What the testator was aiming at, was to secure the children's being brought up in England as Protestants, and the Court will have to decide whether they were substantially educated in England or educated abroad. Both the eldest son and the daughters were brought up in France during that part of their lives in which indelible impressions were most likely to be made upon their minds, and they must be treated as having substantially been educated abroad; the gift over, therefore, takes effect. It is true that a gift over may be void for uncertainty: *Fillingham v. Bromley*; (e) but the Court will not pronounce a limitation to be so, merely because there is a difficulty in ascertaining whether its terms have been complied with. In *Tattersall v. Howell*, (g) the Court directed an inquiry in a case of much more uncertainty than this. Sir WILLIAM GRANT in *Butcher v. Butcher*, (h) declined, on the ground of uncertainty, to enter into the question whether an appointment was illusory; but though the difficulty in such a case is far greater than in a case of the present nature, Lord ELDON, on appeal, (i) held that the Court must grapple with it.

* 670 Where the condition relates to * circumstances of a moral character, the Court will the more readily encounter this difficulty in order to give effect to the substantial intention. *Long v. Ricketts*, (k) is analogous to the present case. Effect must be given to the intention clearly expressed on the whole will. *Hillerson v. Lowe*, (l) *Ellicombe v. Gompertz*. (m) There has here been

(a) 17 Jur. 886.

(b) 1 Coll. 416.

(c) Kay, 534.

(d) 3 Mer. 108.

(e) T. & R. 530.

(g) 2 Mer. 26.

(h) 9 Ves. 382.

(i) 1 Ves. & B. 97.

(k) 2 S. & S. 179.

(l) 2 Hare, 355.

(m) 3 M. & C. 127.

such an education abroad as the Court would not allow its wards to receive. *Campbell v. Mackay*, (a) *Wellesley v. Beaufort*. (b) The Court will construe "as if they were dead," to mean "as if they were dead without issue." *Atkins v. Atkins*, (c) *Anon.* (d)

Mr. Roundell Palmer, Mr. Anderson, and Mr. Amphlett, for the representatives of James Clavering. — It is a settled rule, that a clearly vested gift cannot be divested by a condition subsequent unless such condition be possible, legal, definite, and certain. If the condition be impossible, illegal, indefinite, or uncertain, it has no effect. This case is not analogous to that of *Dickson's Trusts*, (e) where there were words of revocation. Here a positive gift over is necessary. Such a gift over must be certain, legal, and within the rule of perpetuities, and will be construed strictly. *Long v. Dennis*, (g) *Egerton v. Lord Brownlow*, (h) *Doe v. Hicks*, (i) *Jones v. Lord Suffolk*, (k) *Fillingham v. Bromley*, (l) *Walcot v. Botfield*, (m) *Ridgway v. Woodhouse*. (n) Then it has been argued, that a condition of a moral nature is not to be * construed in the same way as one which has reference * 671 only to physical matters. But the condition must in either case be construed strictly, and neither the opinion of Sir W. GRANT nor that of Lord ELDON as to illusory appointments helps the appellant; *Tattersall v. Howell* (o) and *Long v. Ricketts* (p) were cases of conditions precedent and do not bear on this. If "educated in England" means exclusively educated in England, then "educated abroad" means exclusively educated abroad, which no child was, and there is, therefore, no forfeiture. At what time is it alleged that a forfeiture took place? If education in England exclusively was required, a forfeiture must have taken place the moment a child went abroad; for even a short stay on the continent would prevent the education from being exclusively English. If the testator had intended this he would have prohibited the taking the children abroad, which he has not done.

(a) 2 M. & C. 31.

(b) 2 Russ. 1, 29.

(c) Cro. Eliz. 248.

(d) 1 And. 33.

(e) 1 Sim. (N. S.) 37.

(g) 4 Burr. 2052.

(h) 4 H. L. Cas. 228.

(i) 8 Bing. 475.

(k) 1 Bro. C. C. 528.

(l) T. & R. 530.

(m) Kay, 584.

(n) 7 Beav. 437.

(o) 2 Mer. 26.

(p) 2 S. & S. 179.

The most reasonable construction is, that the education was intended to be *bonâ fide* and substantially a Protestant and English education. This test is satisfied as to all the children. While they were young the father kept them with him, but when they came to the most important age they were sent to England. Their education was Protestant; none of them ever was a Roman Catholic, except the Baroness De Montfauçon, and she abjured the Protestant religion, which is a proof that she was brought up a Protestant. It is a question whether the gift over is not void for remoteness, on the ground that it might extend beyond the age of twenty-one. An undergraduate at college cannot, in any sense, be said to have finished his education, though he may have attained twenty-one, and a gift over on an event personal to an unborn child, which may take place after he has attained

* 672 twenty-one, is too remote. * The gift over is only as if the child were dead; not "dead without issue." *Bird v. Johnson*, (a) *Fearne's Con. Rem.* (b) A vested gift is not to be divested unless the precise event, which is indicated as introducing the gift over, has happened. *Harrison v. Foreman*, (c) *Jones v. Bromley*, (d) *Schnell v. Tyrrell*, (e) *Poole v. Bott*, (g) *Procter v. Bishop of Bath and Wells*. (h)

Mr. Rolt and *Mr. Dickinson*, for the representatives of the Baroness De Montfauçon.

Mr. Bailey and *Mr. Chichester*, for the Baroness De Knyff.

Mr. Glasse, *Mr. Faber*, *Mr. F. S. Williams*, *Mr. H. F. Bristowe*, and *Mr. F. M. Nichols* appeared for other parties.

The Attorney-General, in reply. — The question turns on the meaning of "educated in England" and "rites of the Church of England:" "educated" means "furnished with knowledge and principles;" "rites" means the manner of performing divine service. The children were not brought up according to the rites of the Church of England, being educated where they could not

(a) 18 Jur. 796.

(e) 7 Sim. 86.

(b) Page 252.

(g) 17 Jur. 688.

(c) 5 Ves. 207.

(h) 2 H. Bl. 358.

(d) 6 Madd. 137.

attend the ordinances of that church. A forfeiture took place when the parents went to reside permanently abroad, taking their children with them, so that compliance with the condition became impossible. There is no uncertainty in the words "educated abroad:" they are used as the converse of "educated * in * 673 England." Education in England is the object of the testator, and "educated abroad" must be construed with reference to this. Then as to the terms of the gift over, "dead" will be construed to mean "dead without leaving issue." *Spalding v. Spalding.* (a)

Judgment reserved.

1857. January 26.

THE LORD JUSTICE KNIGHT BRUCE.—For the purposes of this appeal I assume in the appellant's favour, as the Vice-Chancellor seems to have assumed, that the appellant's disputed claim in the cause is not open to objection upon the ground either of remoteness or of uncertainty in the testamentary dispositions of his grandfather, the late Mr. George Clavering, under which he asserts title to the three-fourths of the testator's property now in controversy. The Vice-Chancellor, however, considered that upon the facts in evidence the proper construction of those dispositions led to the conclusion at which he arrived against the appellant, and I am of opinion that the appeal cannot be maintained.

The testator's phraseology is not of strict accuracy, and in using the word "rites" he is shown, I think, by the context, to have meant by that expression "doctrine." I do not conceive that he ought to be understood as having required any child of the late Sir Thomas Clavering to be confirmed or to attend public worship or be a communicant; and it appears to me that the three children whose cases we have had to consider, namely, Mr. James Clavering, Madame De Knyff, and Madame * De Montfaçon, * 674 are proved to have been brought up as members of the Church of England, and educated in the faith and according to the doctrine of that church; that the circumstance of one of the ladies having, after her majority, become a papist is immaterial, and that as far as religion is concerned the appellant's claim fails.

Then with regard to other education and the place of education, it appears to me on the evidence: first, that each of the three children received, James the education of a gentleman's son, and the ladies the education of a gentleman's daughters; and, secondly, that each of the three received so much education in England, was at and during such times of life and for periods of such duration educated in England, that not one of them was educated out of England within the meaning and according to the views of the testator, so far as his meaning and views can be collected from the language in which he has expressed himself. There has, in my judgment, been no forfeiture, no defeasance, no shifting on the score of want of education, or on the score of the place of education, or on the ground of religion, and the appeal, I think, ought to be dismissed with costs.

The Lord Justice TURNER, after stating the facts of the case nearly in the words in which they are stated above, proceeded as follows: In the course of the argument before us a distinction was attempted to be raised between the plaintiff's claim to the *corpus* of the real and personal estate and his claim to the accumulations. I propose, therefore, first to deal with the claim to the *corpus*. This claim depends of course upon the proviso contained in the will as to the interests of the children. That proviso has two branches: one relating to the education of the children in England or abroad, the other to their education in the Protestant religion.

* 675 * It will be convenient first to deal with that branch of the proviso which relates to the education of the children in England or abroad. Upon the general effect of the proviso it is, I think, sufficient to say that it cannot, as I apprehend, operate strictly by way of condition, and that whether it amounts in strictness to a conditional limitation or not, it must operate by way of conditional limitation defeating the estates and interests previously given to the children. What we have to consider, therefore, in the first place is, on what event those estates and interests were intended to be defeated. It is to be observed that the testator has not made use of the same expression throughout this proviso. He has declared that the devises to the children are upon the express condition that they shall be educated in England, and in the Protestant religion according to the rites of the Church of

England. He has given over the shares of the children only in the event of their being educated abroad, or not in the Protestant religion according to the rites of the Church of England. What is the meaning of the word "abroad" which the testator has thus used? It was strongly argued for the appellant that it means out of England, but the words of a will ought, as I conceive, to be taken in their ordinary sense, unless the context puts a different interpretation upon them; and I think that if we were to construe the word "abroad" in this will as the appellant has contended it ought to be construed, we should be deviating both from the ordinary meaning of the word and from the sense in which the testator has himself used it. The word "abroad" used in contrast with "England" does not, as I think, mean out of England merely. Persons who go from England to Scotland or Ireland (and other places might be mentioned) are not said to go abroad. A child sent from England to a Scotch or Irish school or university for education, and educated there, would not, ordinarily

* speaking, be said to be educated abroad; and if we look * 676 to the context of this will we find the testator declaring a forfeiture of the life-interest of his son if he resides abroad for more than three months in any year; could a forfeiture of the son's life-interest have been declared upon the mere fact of his having resided in any year for more than three months in Scotland or Ireland? I think most clearly not. What we must take to have been meant by the word "abroad" in this will is, I think, what is generally understood to be meant by the words "foreign parts." What then is the position of the case? There is a declaration of the devise being upon the condition of education in England, and a limitation over upon the event of education in foreign parts. To which of these expressions are we to look in determining whether the limitation over has taken effect? In my opinion we must look to the latter expression, for it is upon the limitation over that the title depends. It was argued for the appellant that the intention of the testator was to secure the education of the children in England, and that we ought to construe the limitation over as to give effect to that intention, to read the word "abroad" therefore as meaning out of England; but in the first place there does not appear to me to be more of intention in this will to secure education in England than to prevent education "abroad;" and looking to the surrounding circumstances I should

rather think that what the testator most apprehended was education abroad, and that it was this he was mainly anxious to prevent. Supposing, however, that his main object was to secure education in England, the case does not seem to me to amount to more than this, — that he has made an imperfect provision for effectuating that purpose, and surely this Court cannot be justified in supplementing the provision which he has made. If the testator had merely declared his intention in the language of the early
* 677 part * of the proviso, this Court could not have supplied the limitation over, and if it could not have supplied the limitation over *in toto*, what power has the Court to amend it? For these reasons it seems to me that the main question which we have to consider in this case is not whether the children were educated in England, but whether they were educated abroad.

We must first consider, then, what the testator meant by being educated. Did he refer to scholastic education only, or to education in the more extended sense of training and bringing up? Looking to the context of the will and to the surrounding circumstances, I think the testator must be taken to have meant by "education," training or bringing up. This I think would be the ordinary meaning of the word "education" as applied to that branch of the proviso which relates to religion, and we cannot, I think, attach to the word one meaning as applied to one of the branches of the proviso, and a different meaning as applied to the other of those branches; besides, the apprehensions which it is plain the testator entertained render it much more reasonable to suppose that he used the word "education" in the extended sense which I have mentioned than in its more limited sense. I think, therefore, that the true meaning of the testator was, that the interests of the children were to be defeated only in the event of their being trained or brought up abroad or in foreign parts. In what cases then can children properly be said to have been educated, trained, or brought up abroad? Not as I apprehend in cases where they have been educated, trained, or brought up partly in England and partly abroad. In such cases it may well be said that they have been partly or even principally or substantially educated, trained,
or brought up abroad; but it cannot, I think, properly be
* 678 said without qualification that they * have been educated, trained, or brought up abroad. Now in this case the limitation over is only in the event of any of the children being educated

abroad without limit or qualification. It is, besides, a limitation which I agree with the Vice-Chancellor in thinking ought to be strictly construed, and under these circumstances I very strongly incline to the opinion that the appellant, in order to entitle himself under this proviso upon the ground of the other children having been educated abroad, was bound to show that they were wholly educated there, which it is perfectly clear they were not.

It was contended, however, on the part of the appellant, that it was sufficient to entitle him under the limitation over if the other children were at all educated abroad, and it may be proper for me therefore to state my opinion upon that view of the case. My opinion upon it agrees with that of the Vice-Chancellor, and substantially for the reasons which he has assigned, and which I abstain from stating at length because he has completely exhausted the subject. In this view of the case I think it much too doubtful what the testator meant by education in England and education abroad to justify this Court in declaring that this limitation ever has taken effect. I think so, even attaching to the word "education" the limited sense in which the Vice-Chancellor seems to have considered that it was used. I think so more strongly, if the word properly bears, as I have thought it does, the more extended sense, of training and bringing up, for I think the training and bringing up of children is one continuus act. It may perhaps in some cases extend beyond the period of minority; in other cases it must determine before majority is attained: but generally speaking, I apprehend, it is to be considered as continuing during the whole period of minority. The children of Sir T. J. Clavering therefore, whose rights * the appellant disputes, must, I think, be con- * 679 sidered to have been in the course of being trained or brought up during the whole period of their minority. They could not be abroad during any part of that period without being trained or brought up during their residence there. The testator must have known this to be the case, and yet he has made no provision against their being taken abroad and declared no forfeiture in that event, although he has carefully provided against his son's residing abroad beyond the limited period in each year which he has mentioned. For these reasons I think the appellant's case fails, so far as it depends upon that branch of the proviso which relates to the education of the children abroad. Upon the other branch of the proviso, as to the children being educated in the

Protestant religion according to the rites of the Church of England, I think it unnecessary to say more than that the appellant has, in my opinion, wholly failed to prove that they were not so educated.

There remains then only the question as to the accumulations. It was attempted in the reply to distinguish this part of the case upon the ground that the accumulations are, by the codicil, given to the children who shall have been educated in England and in the Protestant religion; but they are so given only in the event of all or any of the children having been educated abroad or in the Catholic religion, and the question upon the accumulations therefore is the same as the question upon the *corpus*.

The appeal must, I think, be dismissed and with costs.

1857. January 13, 26. Before the LORDS JUSTICES.

Where the right of electing the minister of a parish had been by deed vested in trustees in trust for the parishioners, *held*, that it was not transferred to the vestry or otherwise affected by the Act 18 & 19 Vict. c. 120 (for the better local management of the metropolis), and the Act 19 & 20 Vict. c. 112 (amending the former), or either of them.

THIS was a motion by way of appeal from the decision of Vice-Chancellor KINDERSLEY refusing a motion for an injunction to restrain the presentation of a clerk to a benefice. By arrangement it was treated as being before their Lordships on motion for a decree.

The bill was filed by two of the parishioners and inhabitants of the parish of St. James, Clerkenwell, on behalf of themselves and the other parishioners, against the vestry of the parish, the trustees in whom the advowson of the church of Clerkenwell was vested, the Rev. Robert Maguire, a clerk whom the vestry had determined to present to the benefice, and the Bishop of London. The material facts of the case were as follows:—

By an indenture dated the 2d of June, 1656, and made between Edward Drake of the one part and Josias Berners, James Bernard, Richard Powell the elder, Richard Powell the younger, and

Benjamin Powell, of the other part, and a fine levied in pursuance thereof, the church of Clerkenwell and the rectory or parsonage thereof, and churchyard there, together with the soil thereof, and the buildings belonging to the said church, with their and every of their rights, members, and appurtenances, and the advowson, donation, and free disposition, and right of patronage of the vicarage of Clerkenwell, with their appurtenances, except a part of the glebe, were limited to the use of J. Berners, J. Bernard, R. Powell the elder, R. Powell the younger, and B. Powell, and their heirs for ever, upon trust and confidence *neverthe- * 681 less to and for the only use, benefit, and behoof, of the parishioners and inhabitants of the parish of St. James, Clerkenwell, and their successors for ever, in as large and ample a manner as Edward Drake theretofore held and enjoyed the same together with the rectory of Clerkenwell by letters-patent under the great seal of England, chargeable nevertheless with one yearly pension, portion, or payment of 4*l.* 18*s.* 9*d.* for the perpetual maintenance of a curate to celebrate divine service in the said church of Clerkenwell, which said pension of 4*l.* 18*s.* 9*d.* it was agreed should be only chargeable upon the said church and churchyard, in exoneration of E. Drake and the part of the glebe excepted from the conveyance.

Questions from time to time arose with reference to the appointment of a curate, which led to repeated litigation.

By a decree of the equity side of the Court of Exchequer in February, 1770, it was declared that the right of election was in the parishioners and inhabitants paying tithe and rates and assessments to the church and poor. An election took place by poll of the parishioners and inhabitants in March, 1770, and a Mr. Siltan was, after three days' poll, duly elected, presented, and licensed. He enjoyed the office until the 28th of July, 1790, when another election took place and a Mr. Davis was elected. He continued to be minister until his death in July, 1804, when another contest took place and proceedings were taken in the Consistory Court, and subsequently an information was filed by the Attorney-General, at the relation of several of the inhabitants, against the churchwardens and others. These proceedings terminated in the enjoyment of the office by the then successful candidate until his death in June, * 1814, when another election took * 682 place and the candidate elected was presented and enjoyed

the office until his death in 1889. Upon that event the Rev. William Faulkener, the late incumbent, was elected by a three days' poll, and duly presented, and continued incumbent until his death, which took place in the month of August, 1856.

In the year 1788 the old parish church of St. James, Clerkenwell, was pulled down. A new church was erected and consecrated in the year 1792, in pursuance of an Act of Parliament passed in the 28th year of King George III. by which the fee-simple of the church was vested in trustees therein named and their successors, to be appointed as thereby provided, but the Act did not affect the trusts of the indenture of the 2d of June, 1656, so far as related to the presentation to the cure.

By the Act 18 & 19 Vict. c. 120, intituled "An Act for the better Local Management of the Metropolis," it was, amongst other things (§ 2), provided that the vestry in every parish mentioned in either of the schedules (A) and (B) of the Act, should consist of a certain number of persons qualified and elected as therein provided, and that the number of vestrymen should consist of not less than 18 or more than 120 persons qualified and selected as provided by the Act. And by the 2d section it is provided that the vestry of every parish mentioned in schedule (A) should be a body corporate, and that every such vestry should by such name respectively have perpetual succession and a common seal, and should sue and be sued and have power to hold land. The 90th section of the Act is as follows: "All the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in sched-

* 683 ule (A) to * this Act, or any part of such parish, now vested in any commissioners or in any body other than the vestry of such parish, or in any officer of any commissioners or other body, and all other duties, powers, and authorities, in any wise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof (except such duties, powers, and authorities, as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto), now vested under any local Act of Parliament in any commissioners, or in any body other than the vestry of such parish, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise

provided, become vested in and be performed and exercised by the vestry of such parish under this Act. And all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish included in any district mentioned in schedule (B) to this Act, or any part of such parish, now vested in any commissioners, vestry, or other body, or in any officer of any commissioners, or other body, and all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof (except such duties, powers, and authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto), now vested under any local Act of Parliament in any commissioners, vestry, or other body, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district; and the provisions of every such Act of * Parliament as aforesaid shall * 684 be applicable to the vestry of every parish mentioned in the said schedule (A), and to every such district board accordingly, and the offices of all commissioners and persons whose powers are determined by this Act shall cease and be determined, and there shall be no new appointment or election to any such office." Schedule (A), referred to in this Act, mentioned "St. James and St. John, Clerkenwell, to be considered as one parish."

By the Act 19 & 20 Vict. c. 112, intituled "An Act to amend an Act of the last Session of Parliament, cap. 120, for the general Local Management of the Metropolis;" it is by § 3 provided as follows: "Save as hereinbefore otherwise provided, all the duties, powers, and privileges (including such as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor) which might have been performed or exercised by any open, or elected or other vestry, or any such meeting as aforesaid, in any parish, under any local Act or otherwise, at the time of the passing of the said Act of the last session, shall be deemed to have become transferred to and vested in the vestry constituted by such last-mentioned Act; except so far as any such duties, powers, or privileges may, in the case of a parish included in any district

mentioned in schedule (B) to the said Act, be vested by § 90 thereof in the board of works of such district: provided that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, which, at the time of the passing of the said Act, were vested in or might be exercised by any guardians, governors, trustees, or commissioners, or any body other than any open, or elected, or * 685 other vestry, or any such * meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees, or commissioners, or other body as aforesaid."

Upon the decease of the last incumbent in the month of August, 1856, a question was raised as to the effect of the provisions of the above Acts of Parliament, and the defendants, the vestry of the united parishes of St. James and St. John, Clerkenwell, constituted under the first-mentioned Act, claimed to be entitled to exercise the right of election. On the 10th of October, 1856, they elected the defendant Robert Maguire.

The bill prayed that it might be declared that the right to elect or present to the living had not been affected by the Acts 18 & 19 Vict. c. 120 and 19 & 20 Vict. c. 112, but that such right remained vested in the inhabitants and parishioners of the parish of Clerkenwell as fully, to all intents and purposes, as it was before the passing of those Acts; and that it might be declared that the election of Mr. Maguire was null and void, and that the trustees of the vestry might be restrained from presenting him to the Bishop of London for induction, and that the Bishop of London might be restrained from inducting him.

On a motion being made before Vice-Chancellor KINDERSLEY for an injunction, his Honor held that the right of presentation was in the new vestry and refused the motion with costs. The plaintiffs appealed, and their appeal motion as stated above was by arrangement turned into a motion for decree.

Mr. Terrell and Mr. Stiffe, for the plaintiffs. — The enactments bearing on the question are 18 & 19 Vict. c. 120, §§ 2, 90, 92, and 19 & 20 Vict. c. 112, §§ 1, 2, 3. The question turns on the * 686 last of the provisions, * for neither of these Acts contains any other which can be argued to have the effect now con-

tended for by the new vestry. This is not a parochial right, but a right vested in the inhabitants of Clerkenwell. It is not a right exercised by any "meeting" as mentioned in 19 & 20 Vict. c. 112, § 3, for a meeting could not elect: a poll was necessary. A vestry is not so constituted as to represent the inhabitants for this purpose; 58 Geo. III. c. 69; *Attorney-General v. Wilkinson*. (a) The mode in which elections of the minister of Clerkenwell have been carried on is settled by usage, and has been recognized by the Court. *Attorney-General v. Parker*, (b) *Attorney-General v. Rutter*, (c) *Attorney-General v. Forster*, (d) *Attorney-General v. Newcome*. (e) There are authorities in favour of such a mode of election in other analogous cases. *Fearon v. Webb*, (g) *Faulkner v. Elger*. (h)

Mr. Hardy, for the defendants, except the Bishop of London. — The first section of the Act 19 & 20 Vict. c. 112, shows that matters relating to the church, and not secular matters only, were in the contemplation of the legislature when this Act was passed, and then the third section makes the powers and privileges, "including such as relate to the affairs of the church," which were formerly exercisable by a parish meeting, exercisable by the new vestry. The right of electing their minister is certainly a privilege relating to the affairs of the church. A vestry is, in contemplation of law, an assembly of the whole parish, (i) and the vestrymen now are chosen in such a way that they may be considered as in fact fairly *representing the parish. An election by such a *687 body is practically far better than one by poll, the evils of which are notorious, it being well known that the election of a Clerkenwell incumbent has led to scenes like those which were common in a contested borough election before the Reform Act.

Mr. T. H. Terrell, in reply.

Judgment reserved.

(a) 3 Brod. & B. 266.

(b) 3 Atk. 576; 1 Ves. 43.

(c) 2 Russ. 101 n.

(d) 10 Ves. 335.

(e) 14 Ves. 1.

(g) 14 Ves. 13.

(h) 4 B. & C. 449.

(i) 1 Burn. Eccl. Law, 415 c.

1857. January 26.

THE LORD JUSTICE KNIGHT BRUCE. — It is unnecessary to say, nor indeed am I sure, what, independently of authority, would have been my opinion and conclusion as to the validity or invalidity of the trust by the deed of 2d of June, 1656, on which the bill in this cause proceeds, expressed to be created in favour of "the parishioners and inhabitants of the parish of St. James, Clerkenwell, and their successors for ever," or as to the true meaning or construction of those words; it being impossible, I think, at the distance of two centuries from the date of the instrument (an instrument on which Lord HARDWICKE and Lord ELDON acted, as those two very eminent persons did) to treat the trust, for any practical purpose at least, as not valid, or to dissent practically from their united views of the proper mode of dealing with the subject. The question, how far, or whether each or either of the two statutes of the present reign, that have necessarily been so often mentioned in the argument, affects the subject, is different. The Vice-Chancellor had this case before him upon an interlocutory application only, we upon that application and also upon the

hearing of the cause; and, after giving my best attention * 688 to the grounds of the decision of that learned * Judge,

whose views on every matter submitted to his consideration are entitled to the best attention; after weighing the reasons adduced by the learned counsel on each side, and looking with care at the two statutes, and especially (though of course not exclusively) at the 2d, 6th, 8th, 90th, 91st, 92d, and 140th sections of the earlier and the 3d and last sections of the later Act, sections, to which, or most of which, the counsel on one or each side wished to draw our particular observation, — I am under the necessity of acknowledging myself not satisfied that, by both or either of the statutes, the equitable title to the advowson, or right of presentation, or of nomination, in dispute has been effected in derogation or to the prejudice of the right asserted by the plaintiffs, upon whom, as it seems to me, the burden of showing that title not to be so affected does not lie. The burden of the argument is, I conceive, with those who assert the title of the defendants, the vestry of the parish of Clerkenwell, as a title restricting, diminishing, or superior to that represented by the plaintiffs. It lies on the vestry to show, if they can, that the legislature has done what they charge

it with. Judging of the objects and intention of the two Acts of Parliament from their contents as well as I am able, it appears to me that neither of them was meant to interfere, or does interfere, with property, or a right such as that which, upon the authority of Lord HARDWICKE and Lord ELDON, and upon other authority also, those, whom in this cause the plaintiffs represent, must for every present purpose be taken by us to have had immediately before the passing of the earlier statute, and, upon the assumption of the irrelevancy of the two Acts, to have now. This I say, not of course having failed to notice the words "duties," "powers," "privileges," "meetings," "parishioners," "inhabitants," ratepayers." I am not satisfied that the letter of the enactments is not with the plaintiffs, but I * am satisfied that the spirit is not against * 689 them. District finance, beadle government, the *munus ædilicium*, seem to have little or nothing to do with the title, whether legal or equitable, to the fee-simple of an advowson or right of nomination to a perpetual curacy. Neither of the statutes, I repeat, convinces or persuades me, nor do the two together, that, whatever may have been designed or hoped out of Parliament, the destruction or modification of such a title, or of the manner of enjoying or using it, was intended by either House of Parliament. If there was any such view it should, and I must suppose would, have been openly expressed. If room for reasonable doubt has been left, the persons who have or would have the right, independently of legislation, must have the benefit of the doubt, for the burden of proof, so far as that phrase is applicable, lies, as I have said, certainly, in my opinion, upon their opponents.

Perhaps, in the absence of authority, my voice would have been for dismissing this bill, either by reason of the uncertainty of the language of the deed of 1656, or on the ground of the inconsistency of the trust professed to be created by it with the principles and rules of the law of this country. But the authorities and my view of the statutes being as they are, I must hold the plaintiffs entitled to a decree with costs against the vestry, who, as to the costs to be paid by them, which must, I suppose, include those of the trustees, and may, probably with fairness and propriety, include those of Mr. Maguire also, will be able to indemnify themselves out of the public funds of the parish; at least so I understand, nor have I any objection to that.

Our decree may, I think, declare that neither of the two statutes

has changed or affected the title to nominate or the right of nomination to the perpetual curacy of the * parish of St. James, Clerkenwell, or the manner of enjoying or exercising that title or right, and may order an injunction accordingly. Let me add how much I hope that if consequently upon our decision there shall be an election (I regret to have to use the term) of a clergyman for this—I had almost said unfortunate—parish, it may be conducted not with less charity, forbearance, order, temperance, peacefulness, and purity than the inhabitants and their neighbours, not so long ago, upon analogous, but more exclusively civil, occasions were wont to practise at Brentford and Covent Garden.

THE LORD JUSTICE TURNER. — This is a question as to the right of presentation to the living of St. James, Clerkenwell, which is now vacant. The right to present to this living is legally vested in the trustees of an indenture dated the 2d of June, 1656, and the plaintiffs in this suit, suing on behalf of themselves and all other, the parishioners and inhabitants of the parish, insist that the trustees are bound to present a clerk elected by the parishioners and inhabitants. The defendants, the vestry of the parish, appointed under the Metropolis Local Management Act, on the other hand claim to have become entitled to the presentation to this living under the provisions of that Act, or of the Metropolis Local Management Amendment Act, and they and the defendant, the Rev. Robert Maguire, insist that the trustees are bound to present the defendant, the Rev. Robert Maguire, who has been elected by the vestry to the living.

Upon the facts before us we must, I think, assume that up to the time of the passing of the Acts to which I have referred, the right of electing the minister of this * parish belonged, as it was declared by a decree of the Court of Exchequer, dated the 28th of February, 1770, to have belonged to the parishioners and inhabitants of the parish paying tithes, rates, and assessments to the church and poor, and must also assume that this right was exercised by those parishioners and inhabitants at vestry meetings. The question now to be determined is, whether the right which thus belonged to, and has been exercised by, the parishioners and inhabitants, has, by the Acts referred to, been taken from them

and transferred to the defendants the vestry of the parish appointed under the first of those Acts.

The question must of course depend upon the construction of the Acts. In construing them we are bound, I think, to bear in mind that what is contended for on the part of the defendants is, that they operate to take away an undoubted privilege, and, as I conceive, a no less undoubted right of property in the parishioners and inhabitants of this parish, and that in construing Acts of Parliament, and more especially Acts which are said to involve consequences of such a nature, it is to be considered not merely whether the words of the Acts embrace the rights which are said to be affected by them, but whether, upon a fair view of the purpose of the legislature, they were intended to affect those rights. Bearing in mind this consideration, we must first see what was the purpose of these Acts. It is explained by the recital of the first Act, which is this: "Whereas it is expedient that provision should be made for the better local management of the metropolis in respect of the sewerage and drainage, and the paving, cleansing, lighting, and improvements thereof." It is plain, therefore, so far as the recital is concerned, that this Act at least had no such end in view as the defendants *impute to the legis- * 692 lature. The enactments of an Act, however, may, no doubt, extend beyond the recital, and we must therefore, look to the enactments of this first Act. I have carefully examined them, and upon the result of that examination, I am satisfied that they do not affect the question we have to determine.

The 90th section of the first Act was much referred to in the argument before us, and it is certainly important to be considered with reference to the provisions of the Amendment Act, but except in that point of view it does not appear to me to be of any importance. The section is as follows: "All the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in schedule (A) to this Act" (the parish in question being one of those parishes), "or any part of such parish, now vested in any commissioners, or in any body other than the vestry of such parish, or in any officer of any commissioners or other body, and all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof (except such duties, powers, and authorities as relate to

the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto), now vested under any local Act of Parliament in any commissioners, or in any body other than the vestry of such parish, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the vestry of such parish under this Act." Then there follows another part of the section,

* 693 which applies to distinct parishes, where the provisions of the Act are to vest the same powers in the different boards of works of those parishes. Now there are two branches of duties, powers, and authorities referred to by this section: first, "all the duties, powers, and authorities, for or in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in schedule (A) to this Act;" and secondly, "all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof," and then, after a parenthetical exception, the sentence runs on "now vested under any local Act of Parliament in any commissioners, or in any body other than the vestry of such parish, or in any such officer as aforesaid." The first of these branches clearly cannot affect the present question, and I think the second of the branches as little affects it, for that branch seems to me to be confined to duties, powers, and authorities, vested under local Acts of Parliament in the bodies or persons referred to, the words "now vested under any local Act of Parliament" in that section, as I read this branch of the section, overruling the subsequent words and confining the operation of this part of the section to duties, powers, and authorities, derived from or depending upon local Acts. It is important, however, to consider what are the duties, powers, and authorities to which this branch of the section refers. They are expressed to be those relating to the regulation, government, or concerns of parishes. What is meant by the regulation or government of a parish it is not very difficult to understand, but what may be meant by its concerns is perhaps more open to doubt. Looking, however, to the purview and context of this Act, I think that the fair and reasonable interpretation of this word "concerns" as here used is the

* 694 "business concerns" of the parish, *and that it would

neither be right nor reasonable to hold the presentation to this living by the election of the parishioners to be one of the concerns of the parish within the meaning of this section. It is true that there is an exception in this branch of the section of duties, powers, and authorities, relating, amongst other things, to the affairs of the church, from which it would seem to follow that some duties, powers, and authorities, relating to the affairs of the church, might, but for the exception, have been included in the category of duties, powers, and authorities, to which this branch of the section applies; but whatever else might have been so included, the duty or power of presenting to this living could not, as I think, have been included, the duties, powers, and authorities referred to by the section being, as I have already said, those which were vested under local Acts, and the right of presentation not being so vested. I am of opinion, therefore, that the first of these Acts, whether considered with reference to its purview or to its enactments (and there are many other enactments contained in it which, in my judgment, lead to the same conclusion, although I do not think it necessary to refer to them) ought not to be construed to have affected the right of presentation in question.

The defendants' case then must stand or fall by the amendment Act, and it was indeed upon this Act that reliance was mainly placed in the argument. It is to be observed upon this Act that by the 12th section it is to be construed with the former Act and as one Act. The first section of this Act is as follows: "Where at the time of the passing of the said Act the power of making church rates, or rates of the nature of church rates, in any parish was vested in any open vestry, or in any meeting in the nature of an open vestry meeting, or in any *meeting of *695 the parishioners, inhabitants, or ratepayers generally, or of such of the parishioners, inhabitants, or ratepayers as were rated at or above any specified amount or value (whether such vestry or meeting were holden for the parish at large or for any liberty or other district therein), such power shall not be deemed to have become vested in the vestry constituted in such parish under the said Act, but shall be exercised as if the said Act had not been passed; provided always that this Act shall not affect any such rate made before the passing thereof by any such vestry as last aforesaid." Having regard to the provisions of the first Act, by which all matters relating to the affairs of the church were

excluded, this section does not appear to me to be very intelligible. It was referred to on the part of the defendants as showing that matters relating to the church were in the immediate contemplation of the legislature, but it does not follow that because church rates were then in contemplation, presentations to livings of this description were also in contemplation. On the contrary, the express provision as to church rates and the absence of provisions as to such livings, leads, as it seems to me, to the opposite conclusion.

The 2d section of this Amendment Act is not, I think, material to the purpose. It is upon the 3d section the question before us must depend. I will first read this section without reference to the words in the parenthesis, which bring the duties, powers, and authorities relating to the affairs of the church within the operation of the Act. [His Lordship read the clause omitting the words in the parenthesis.] Now what are the duties, powers, and privileges to which this section thus read was intended to refer?

The Act, as I have observed, is to be construed with the * 696 former Act as one * Act, and this 3d section plainly has reference to the 90th section of the former Act, for the very words of that section are in a great degree followed. Are we then to understand the legislature, having spoken in one section, the 90th section, of duties, powers, and authorities of a particular description, those relating to the regulation, government, or concerns of parishes, to have intended by the words "duties, powers, and privileges" in another section, which is to be considered as part of the same Act, to have referred to duties, powers, and privileges of a wholly different description? I am not disposed to impute to the legislature any such intention. If such an intention could be imputed in any case, I think it would be difficult to impute it in this case, for the language of this very section seems to treat the duties, powers, and privileges referred to in it as identical with the duties, powers, and authorities referred to in the 90th section, there being an exception in these terms, "except so far as any such duties, powers, or privileges may, in the case of a parish included in any district mentioned in schedule (B) to the said Act, be vested, by section 90 thereof in the board of works of such district." I think that the words "duties, powers, and privileges" in the 3d section must be construed to be duties, powers, and privileges of the same nature as those which are mentioned in the

90th section. The word "privileges," indeed, is used in one place, and the word "authorities" in the other, but I think the distinction between those words too fine to be made the foundation of any just inference, and even if a distinction is to be drawn between "privileges" in the one section and "authorities" in the other, I should think we ought to construe the word "privileges" in this 3d section as referring to privileges *ejusdem generis* as those mentioned in the former Act, in the 91st section of which that word will * be found, and is applied to a wholly different * 697 subject. At all events I think we should not be justified in applying this word "privileges," as used in the second Act, to a subject differing so essentially from the subjects to which the word, as used in the first Act, is applied.

It remains then to consider how the case stands if we introduce the words in the parenthesis in the sentence, "Save as hereinbefore otherwise provided, all the duties, powers, and privileges (including such as relate to the affairs of the church or the management or relief of the poor), &c." We have here the words "the affairs of the church." I have already observed upon the construction to be put upon those words in the original Act, and this Act being in effect to be taken as part of the original Act, I do not see how any different construction can be put upon them in this Act. I think, therefore, they cannot be construed so as to affect this right of presentation. I have yet further difficulty in assenting to the argument on the part of the defendants. The 3d section of the Amendment Act contains this proviso. [His Lordship read it.] Now at the time of the passing of the Act it was the duty of the trustees in whom the legal right was vested, to present the clerk elected by the parishioners and inhabitants, and according to this proviso that duty is to continue vested in them. The presentation by them of a clerk elected by the vestry would be a direct breach of that duty, and surely we cannot suppose that the legislature, intending the duty to continue, could intend to enact the non-observance of it.

Upon these grounds, much as I distrust my own opinion when it differs from that of Sir RICHARD KINDERSLEY, I find myself unable to agree in the conclusion * at which he has in this * 698 case arrived. I think there must be a decree declaring to the effect, that the right to elect or present to this living has not been affected by the Act for the better local management of the

metropolis or by the Act for the Amendment of the last-mentioned Act, with a declaration that the election complained of was and is null and void, and a perpetual injunction to restrain the defendants, the vestry and the trustees, from presenting or nominating Mr. Maguire to the bishop for institution or a license to or for the living or perpetual curacy, upon the footing or in consequence of such election.

Considering this question to be one which the interests of the parish required to be settled, I think the costs of the suit must be paid by the vestry, who of course will be entitled to them out of the rates.

ASHTON v. WOOD.

1857. January 28. Before the LORDS JUSTICES.

Where, by a slip, a solicitor's clerk who was conducting a cause, set it down for further consideration instead of applying to vary the certificate of the chief clerk, not being aware that counsel had advised that an application to vary the certificate ought to be made.

Held, a proper case for allowing notice of motion to be given to vary the certificate.¹

THIS was an appeal by the defendant in a suit instituted by vendors for specific performance, from an order of the Vice-Chancellor STUART dated the 12th of January, 1857, giving leave to the plaintiffs to give notice of motion to discharge or vary the chief clerk's certificate dated the 5th of November, 1856, by which he found that the plaintiffs could not make a good title.

* 699 The usual decree had been made on the 22d of * February, 1856, directing an inquiry whether a good title was made to the property in question, and if it was made when it was first shown that a good title could be made. The chief clerk, by certificate dated the 5th of November, 1856, and filed on the 11th, certified that a good title could not be made.

The plaintiffs did not acquiesce in this finding, but instead of applying to vary the certificate they set down the cause for further consideration. Their doing so was accounted for in an affidavit

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1321.

by the clerk of their solicitor, upon which the order appealed from was made. The material parts of this affidavit were as follows:—

“That the said order [the reference as to title] was carried into chambers and proceeded with: when his Honor’s chief clerk referred it to one of the conveyancing counsel to look into the title, and Mr. Jarman was the conveyancing counsel in rotation to whom it was referred. The abstract and other papers having been laid before him, he was of opinion that a good title had not been shown to the whole of the property in question. Mr. Harrison the plaintiffs’ junior counsel advised thereon, and among other things stated that, in his opinion, the course for the plaintiffs to pursue would be to apply to vary the certificate, stating the objections thereto.

“That Mr. Day, the plaintiffs’ agent in this cause, previous to the long vacation had the management of this cause, and I say that I acted as his assistant in the chancery department and was in the habit of taking instructions from him in the progress of the various suits in the office, and that since then the conduct of this suit has devolved upon me.

* “That on the 11th of November, 1856, the chief clerk *700 made his certificate, certifying that a good title had not been shown. I filed the said certificate and set the cause down for further consideration in the usual course; and I positively swear that neither before the filing thereof or since did it once occur to me to give notice of motion to vary the said certificate, and that I was under the full impression that the questions to be decided on the said certificate could be brought before this honorable Court at the hearing of the said cause upon further consideration.

“I say that, until after the cause came into the paper for hearing, I was not aware that counsel had advised that an application should be made to vary the certificate, and that, when I delivered to the said Mr. Harrison a brief on the further consideration of the said cause, he inquired of me whether any such notice of motion as above mentioned had been given, and referred me to his opinion on the subject to the effect above mentioned. I then waited upon the defendant’s agent and informed him of the omission, and asked him if he would consent to waive the regular service of the notice, which he refused to do.

“I further say that the omission to serve the said notice of

motion was not for delay or for any improper purpose, but that it is entirely a slip; and, as I have before stated, it never once occurred to me that I ought to give the notice of motion, but that I set the cause down for hearing for further consideration, as soon as the time arrived for doing so, under the full impression that that was the proper and only necessary course to be pursued in order that the question in dispute between the plaintiffs and defendants might be decided by this honorable Court."

* 701 * The plaintiff's solicitor, upon discovering the mistake, applied to the defendant's solicitor to consent to leave being given to serve a notice of motion to vary the certificate, notwithstanding the expiration of the eight days from its filing. The defendant's solicitor having refused to give such consent, the plaintiffs moved that they might be at liberty to serve a notice of motion to vary the certificate, notwithstanding eight clear days after filing the certificate had expired, and that such motion might be heard with the cause for further consideration. On the 12th of January, 1857, the Vice-Chancellor STUART made an order giving leave to serve notice of motion accordingly. The defendant now moved to discharge this order.

Mr. Malins and Mr. Charles Hall, for the appellant. — Under 15 & 16 Vict. c. 80, § 34, as strong a case is required to open a certificate as would have been required under the old practice to open a Master's report which had been absolutely confirmed. Such circumstances as those in the present case would not have been enough under the old practice: *Turner v. Turner*; (a) nor are they now: *Howell v. Kightley*, (b) *Ware v. Watson*. (c)

Mr. Wigram and Mr. Harrison, for the plaintiff, were not called upon.

THE LORD JUSTICE TURNER. — In my opinion it is impossible to discharge the order appealed from. What the plaintiffs ask is in the discretion * of the Court, and ought to be granted when asked for on reasonable grounds. It is plain that the clerk who conducted the plaintiff's case either was igno-

(a) 1 Sw. 154.

(c) 7 De G., M. & G. 739.

(b) 2 Jur. (N. S.) 455.

rant of the opinion which had been given or had forgotten or misunderstood it. In such a case I am of opinion that the Court would have allowed exceptions to be taken to a Master's report after it had been absolutely confirmed.¹ The recent cases which have been referred to do not appear to me to govern the present, for in one of them no special ground for opening the certificate was shown, and the other related to opening biddings, a branch of practice which stands on peculiar grounds.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion. There has been a great slip, but it was an honest slip, and the demands of justice are more in favour of the order appealed from than against it.

It was ordered that the costs of the appeal should be left to be dealt with by the Vice-Chancellor.

* MANSER v. DIX.

* 703

1857. January 30. February 10, 11. Before the LORDS JUSTICES.

Under a trust to sell property which was subject to a mortgage, and out of the proceeds to pay off the mortgage and pay the surplus to the mortgagor: *Held*, that a sale subject to the mortgage was valid.

A lease for years contained a covenant to pay rent, and a proviso for re-entry on non-payment of rent, the rent "being first lawfully demanded." The property being vacant, the landlord asked for payment of rent from the person liable to pay it, and not receiving it, re-entered: *Held*, that there had been a sufficient demand, and that the lease was effectually determined.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor Wood.

On the 26th of March, 1840, the plaintiff assigned certain leasehold property at Brighton, to which he was entitled for the residue of a term of ninety-three and a quarter years under a lease dated the 28th of September, 1830, to John Langford, by way of mortgage to secure 400*l.* and interest.

The plaintiff was at the same time entitled to other property at

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1313, 1314.

Brighton, under a lease dated the 29th of May, 1833, by which, Thomas Attree demised the property to him for eighty-seven years. The lease contained the following proviso for re-entry: " Provided also, that if the said yearly rent hereby reserved, or any part thereof, shall be unpaid for the space of twenty-one days next after any or either of the days whereon the same is appointed to be paid as aforesaid (being first lawfully demanded upon or at any time after the expiration of the said twenty-one days), or if the said F. Manser, his executors, administrators, or assigns, shall neglect or refuse to observe and keep all or any of the covenants and clauses on his and their part herein contained, then it shall be lawful for the said Thomas Attree, his executors, administrators, or assigns, into and upon the said demised premises to re-enter, and the same and every part thereof, with the appurtenances, to have again and enjoy as in his and their former estate."

* 704 * In November, 1843, the plaintiff agreed to mortgage both the above properties (as well as some other leaseholds, held under leases of the 28th of June, 1825, and the 1st of February, 1828, and already mortgaged on the 3d of June, 1828, to Robert Dix for 700*l.*) to Thomas Benson for securing 1000*l.* and interest, and deposited the lease of May, 1833, with Thomas Benson accordingly.

In the early part of 1845, the plaintiff being embarrassed, agreed to vest the above properties in trustees for sale. He accordingly executed an indenture, dated the 12th of February, 1845, and expressed to be made between the plaintiff of the first part, Robert Dix of the second part, and Thomas Benson of the third part, James Tennant of the fourth part, and Thomas Benson of the fifth part; whereby, after reciting the leases and mortgages, and the agreement of November, 1843, and the deposit of the lease of 1833, with Benson, and that the 700*l.* remained owing to Dix on his security, with 309*l.* for arrears of interest, and that the 1000*l.* secured by the agreement of November, 1843, remained owing to Benson on his security, with 12*l.* 2*s.* 6*d.* for arrears of interest up to the 18th of November, then last, and the sum of 5*l.* for expenses; and reciting that the plaintiff was desirous that the premises respectively comprised in the said several indentures of lease should be absolutely sold and disposed of, for the purpose of paying off the several mortgages and securities thereinbefore recited; and that, in order to facilitate such sale, it had been agreed that all the

premises comprised in the two indentures of lease firstly recited (the leaseholds in Dix's mortgage) should be assigned to James Tennant, and that the two several indentures of lease of the 28th of September, 1830, and the 29th of May, 1833, should be assigned to Thomas Benson upon the trusts thereafter declared, the plaintiff and Dix and * Benson, purported to * 705 assign the properties comprised in Dix's mortgage to Tennant, with their appurtenances, upon trust to sell the premises, either together or in lots, and either by public auction or private contract, subject or not subject to any special or other conditions or stipulations relative to the title or evidence of title as to him or them should seem reasonable, with liberty for him or them to buy in the same premises or any part thereof respectively at any auction or auctions to be holden for the sale thereof, and to resell the same or any part thereof at any future auction or by private contract. And it was thereby agreed, that, for the purposes aforesaid, it should be lawful for Tennant, his executors or administrators, to enter into, make, and execute all such contracts, deeds, assignments, and assurances as to him or them should seem reasonable. And it was further agreed, that all such contracts, deeds, assignments, and assurances as should be entered into, made, and executed by Tennant, his executors or administrators, by virtue of the deed, should, whether the plaintiff and Dix and Benson or any of them, or any of their executors, administrators, or assigns, should or should not join therein or further assent thereto, be equally valid and effectual, and should bind the plaintiff and Dix and Benson respectively, and their respective executors, administrators, and assigns, and all persons whomsoever claiming or to claim by, from, through, under, or in trust for them or any of them. The usual power to give receipts was given to Tennant, his executors and administrators. And it was further agreed that Tennant, his executors or administrators, should stand possessed of the moneys to arise by such sale or sales, and of the rents and profits of the property until sold, upon trust, in the first place to discharge one moiety of all the costs and expenses attending the preparing, engrossing, and executing the now stating indenture; and, in the second place, * to pay the rents due, or which from * 706 time to time until such sale or sales as aforesaid should become due by virtue of the leases under which the property was held, and the expenses (if any) of observing and performing the

covenants and conditions in the leases, and the expense of repairs and fire insurance; and, in the third place, to pay all such expenses as he or they should be put unto in effecting the sales or otherwise in the execution of the trusts; and, in the next place, to pay to Dix and Benson respectively, or their respective executors or administrators, the several principal sums of money and interest secured to them, respectively, by their securities, and all costs and expenses due to them thereunder, according to their respective priorities of charge, in the same manner as the same would have been payable in case the now stating indenture had not been made; and after full payment of all principal and interest moneys, and all such other payments as aforesaid, upon trust to pay the residue (if any) of the moneys arising from such sale or sales to the plaintiff, his executors or administrators. By a further operative part of the same indenture the plaintiff assigned to Benson, his executors, administrators, and assigns, the premises comprised in the leases of the 28th of September, 1830, and the 29th of May, 1833, for the respective residues of the terms of years granted by those leases, subject as to the said indenture of lease of the 28th of September, 1830, to the said indenture of mortgage of the 26th of March, 1840; nevertheless, upon trust to sell the said premises so lastly thereinbefore assigned as aforesaid in like manner as was thereinbefore declared in reference to the premises thereinbefore assigned to Tennant; and with like power to enter into and rescind contracts, and to execute assignments and other assurances for giving receipts and other powers as were thereinbefore declared and given as to premises thereinbe-

* 707 fore first assigned, as * fully and effectually as Tennant was thereinbefore empowered to do, and as if the same clauses had been repeated with the name "Thomas Benson" substituted for that of "James Tennant." And it was further agreed, that Benson, his executors and administrators, should stand possessed of the moneys to arise by such sale or sales as aforesaid, and of the rents and profits thereof, until the same should be sold, upon trust, in the first, second, and third places, for the like trusts and purposes as were thereinbefore expressed and declared in reference to the moneys to be produced by the sale of and the rents to be produced from the said premises thereinbefore assigned to Tennant, or as near thereto as the circumstances of the case would admit. And, in the fourth place, as to the proceeds arising from

the sale of the premises comprised in the lease of the 28th of September, 1830, to pay Langford, his executors, administrators, or assigns, the said sum of 400*l.*, and all interest which should then be due thereon. And, in the fifth place, after satisfaction as aforesaid of the 400*l.* and interest, in trust to retain to himself or themselves the 100*l.*, or so much thereof as should be then unpaid, with interest thereon at the rate aforesaid; and after full payment of all principal and interest moneys and such other payments, costs, and expenses as aforesaid, upon trust to pay the residue (if any) of the moneys arising from such sale or sales unto the plaintiff, his executors or administrators. And it was further agreed, that it should be lawful for Dix and Benson, or either of them, to bid for the said premises or any part thereof, at any public auction, and contract for and become the absolute purchaser thereof at such public auction; and also to contract with Tennant, his executors or administrators, as to the premises assigned to him as thereinbefore mentioned, for the absolute purchase thereof by private contract, after the same should have been offered for sale by * public auction. And it was agreed, that in every assign- * 708 ment of the premises which should be sold under the now stating indenture should be contained a covenant on the part of the purchaser, his heirs, executors, and administrators, for payment of the rent and performance of the covenants in the lease or leases of the premises sold to him or them on the lessees' part to be paid, observed, or performed, and for indemnifying the plaintiff, his heirs, executors, and administrators, from the payment of the same rents and observance and performance of the same covenants respectively.

This deed was executed by the plaintiff, and the other persons named as parties acceded to it, though they did not execute it.

Benson died in 1845, leaving a will, by which he appointed William Winch his executor, who thus became the legal owner of the term created by the lease of 29th of May, 1838.

In 1847, Attree, to whom several years' rent of the premises comprised in the lease of 29th of May, 1838, were due, finding that they were vacant and that there was no sufficient distress upon them, applied to Winch, whom he understood to be the assignee. Winch proposed to sell the leasehold interest to Attree. Attree declined this offer, and stated his intention to re-enter, and on the 18th of November, 1847, finding the premises unoccupied

and falling into decay, he re-entered. Subsequently, in 1850, he entered into a contract to sell the fee-simple in possession to Davis, who, finding that Winch disputed the effect of the re-entry, determined by way of precaution to buy up his title.

* 709 About the same time Davis entered into a contract * with Frederick Langford, who was one of the executors of John Langford, the mortgagee, and was owner in fee of the reversion expectant on the lease of 28th of September, 1830, for the purchase of the fee-simple of the property comprised in that lease.

In June, 1851, Winch agreed to sell to Frederick Langford for 135*l.* his interest, beneficial or otherwise, as Benson's executor under the agreement of November, 1843, and the deed of February, 1845. This agreement was entered into as a means of completing the arrangement above referred to.

By an indenture dated the 25th of August, 1851, indorsed on the indenture of the 12th of February, 1845, reciting the last-mentioned agreement, and that 135*l.* was the full value of the leaseholds after satisfying the incumbrances, and that it had been entered into by Frederick Langford on behalf of himself, Dix's executors, and Davis, and that Dix's executors and Davis had paid to Langford their proportionate parts of the 135*l.*, Winch, in exercise of the trust for sale and in consideration of 135*l.* paid to him by Langford, assigned, and Dix's executors confirmed to Frederick Langford the premises comprised in the lease of 28th of September, 1830, for all the residue of the term, subject to the rents and covenants, "and subject also to the said mortgage of the 26th day of March, 1840, and to the principal and interest moneys thereby secured." By another witnessing part, Winch, in exercise of the trust for sale, assigned, and Frederick Langford and Dix's executors confirmed, to Davis the premises comprised in the lease of the 29th of May, 1833, for all the residue of the term.

On the 17th of November, 1851, Frederick Langford conveyed to Davis as a fee-simple in possession the * property comprised in the lease of 28th of September, 1830, and on the same day Attree conveyed to Davis as a fee-simple in possession the property comprised in the lease of the 29th of May, 1833.

The plaintiff in October, 1854, filed his bill, seeking among other things to redeem the terms granted by the two last-mentioned leases, and praying for an account against Davis as mortgagee in possession. Vice-Chancellor Wood dismissed the bill

with costs as against Davis, and from this decision the plaintiff appealed.

Mr. Rolt and Mr. Goldsmid, for the appellant. — The trust under the deed of 1845 is express, that the purchase-money of the property in the lease of 1830 is to be applied in paying off the mortgage upon it. There was, therefore, no power to sell the equity of redemption, and a sale subject to the mortgage is invalid. A sale which leaves the mortgagor subject to his personal liability to pay the mortgage debt is contrary to the spirit of a power worded like this. The re-entry by Attree did not determine the lease of 1833, for it is not alleged that the rent was "lawfully demanded." The title to this leasehold interest, therefore, depends on the execution of the trust for sale, and as the sale which is one transaction comprises the equity of redemption of the term created by the lease of 1830, it is bad altogether.

Mr. Chandless and Mr. Hislop Clarke, for Dix's executors.

Mr. Willcock and Mr. Pole, for Davis. — It would be most inconvenient to hold that a trustee for sale of a mortgaged property is debarred from selling the equity of redemption, because the trust of the sale-moneys is to pay off the mortgage. To hold this would * make a sale impracticable, unless the mortga- * 711 gee chose to be accommodating. The mortgagee cannot be compelled to concur without six months' notice to receive his money. Is a trustee to be bound to give this notice, which, if the property should remain unsold, would place him in a situation of the greatest embarrassment? The power ought to be construed as directing the trustees to sell, free from the mortgage if the mortgagee concurs, and subject to it if he does not concur. The re-entry by Attree was good, and effectually determined the lease of 1833. *Gregory v. Wilson*, (a) *Job v. Bannister*. (b)

Mr. Daniel and Mr. Murray, for another defendant.

Mr. Goldsmid, in reply. — Attree ought to have made a strictly legal demand before he re-entered, or else have served a declaration

(a) 9 Hare, 683.

(b) 28 Law T. 242.

in ejectment under 4 Geo. 2, c. 28, § 2. 1 Wms. Saund., (a) Woodfall's Land. & Ten., (b) *Doe v. Shawcross*, (c) *Doe v. Knowles*. (d) Then as to the other point, it is no doubt more convenient for a trustee to be at liberty to sell property subject to the mortgage; but mere inconvenience is not a sufficient reason for departing from the plain words of an instrument.

THE LORD JUSTICE KNIGHT BRUCE.—Substantially, notwithstanding the time over which the arguments in this case have extended, there are only two points in it. First, whether Attree effectually put an end to the lease of 1833 by his re-entry; and secondly, whether the trusts for sale created by the deed of 1845 were duly executed.

* 712 * As to the first point the circumstances were these.

Considerable rent was in arrear, the lessee was at a distance from the property, and the property was physically vacant. The lease was a chattel lease, and the rent was not merely reserved rent, but a debt secured by a covenant in the lease, and by being rent it does not lose its character of being a debt due on covenant. This being so, rent is demanded — not on the property, for it could not be demanded there. A considerable time afterwards the lessor re-enters. It is said that he had no right to do so because the rent had not been “lawfully demanded” according to the proviso. I am of opinion that, having regard to the circumstances of the case, to the chattel nature of the lease, and to the covenant for payment, the rent was lawfully demanded within the meaning of the clause in the deed, and that the lease was therefore destroyed. But if I felt a doubt on this point (and I feel none), still in my opinion, after this lapse of time, the bill not having been filed till October, 1854, a Court of Equity ought not to interfere to assist the plaintiff. The plaintiff's case therefore fails entirely on this point.

As to the second part of the case, a trust for sale was created by the plaintiff. The subject of it was an equity of redemption. In the clause containing the trust for sale there was a provision that the first mortgage should be paid off. Therefore, it is said, the trust was not duly exercised unless the first mortgage was paid off out of the purchase-moneys. To this I cannot accede. My opinion

(a) Page 287.

(c) 3 B. & C. 752.

(b) Page 274 (7th ed.).

(d) 8 Jur. 19.

upon the construction of the words creating this trust is, that while they authorized the trustee to pay off the first mortgage out of the proceeds if he could conveniently do so, they did not require this to be done. The inconveniences arising from holding otherwise would be very great. Was the trustee to give the mortgagee notice six months before the sale to receive his money, * when it was uncertain whether a sale would be effected, * 713 or what it would produce; or was he to embarrass himself in his contract for sale by binding the purchaser to wait six months before completion? If the property was not worth what was due on the first mortgage, was it never to be sold? Was the trustee to be debarred from selling the equity of redemption for what it would fetch? I think that the sale was well made. If I had felt any doubt as to the original validity of the sale, still the lapse of time would, I think, be fatal to the plaintiff's case, and he must, in my opinion, pay the costs of the suit.

THE LORD JUSTICE TURNER. — I am of the same opinion. I moreover doubt the right of the plaintiff to file such a bill as this at all. The bill is for redemption after the plaintiff has executed a conveyance to trustees in trust to sell, and the trustee has sold. I think that the proper remedy in such a case is to seek to have the sale set aside and a new sale made. I do not, however, see any sufficient reason to impeach this sale, and therefore, even had the bill been in proper form, I do not think the Court would have set aside this sale for the purpose of directing another.

* BENTINCK v. THE NORFOLK ESTUARY COM- * 714
PANY.¹

1857. January 31. February 14. Before the LORDS JUSTICES.

An estuary company was by its Act, with which the Lands Clauses Consolidation Act was incorporated, empowered to make and maintain certain cuts and works, and to enter upon, take, and use such of the lands delineated in the deposited plans as might be necessary for that purpose.

¹ S. C., 3 Jur. N. S. 345; 26 L. J. Ch. 404.

Held, that the company were not entitled to take compulsorily land which was required not for the site of the cuts or works, but to supply materials for the execution of works on other land.¹

THIS case first came before the Lords Justices on a motion by way of appeal from an order of Vice-Chancellor WOOD granting an injunction to restrain the defendants, the Norfolk Estuary Company, from entering on some land of the plaintiffs, in alleged exercise of the powers of their acts; but it was arranged that it should be treated as if the cause had come on for hearing.

The Norfolk Estuary Company was incorporated by "The Norfolk Estuary Act, 1846" (9 & 10 Vict. c. 388), for the purpose of reclaiming part of the Wash. The Lands Clauses Act, 1845, and the Companies Clauses Act were incorporated with this Act. By section 23 it was enacted, that subject to the provisions of the Act itself and the Acts therein referred to, the company should have power to enter upon the lands to be reclaimed, and all or any other of the lands delineated in the plans and described in the books of reference thereafter mentioned, which it might be necessary or proper for them to enter for the purpose of executing the several works which they were by the Act directed or authorized to execute. The Act then provided for the execution of certain works which were to be made, and the 35th section was as follows: "And whereas plans and sections describing the several cuts proposed to be executed, and also books of reference containing the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of the lands through or over which

* 715 the said several cuts * and works appertaining thereto are proposed to be carried or made, have been deposited with the clerk of the peace for the borough of King's Lynn, and with the clerk of the peace of the division of South Holland in the county of Lincoln: be it enacted, that subject to the provisions in this and the said recited Acts contained, it shall be lawful for the said company to make and maintain the said cuts and works appertaining thereto (in the line and upon the lands delineated in the said plans and described in the said books of reference), and to enter upon, take, and use such of the said lands as may be necessary for that purpose."

Sect. 38. "That it shall be lawful for the company to deviate

¹ See Kerr Inj. 302, 303, 319, 320.

from the line delineated on the plans of the said new cut so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent, in passing through a town, village, or lands continuously built upon, than ten yards, or elsewhere to a greater extent than 100 yards from the said line, and that the cut by means of such deviation be not made to extend into the lands of any person whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein provided for in cases of unintentional errors in the said books of reference."

No steps were taken towards the execution of the works until after the passing of "The Norfolk Estuary Amendment Act, 1849" (12 & 13 Vict. c. 195), which directed the company to make in the first place the New Cut or Marsh Cut referred to in the 38th section of the * former Act, and a cut across a place * 716 called Vinegar Middle, which was also part of the works provided for by the former Act.

The company proceeded to the execution of the New Cut, which was finished before 1856. Some lands of the plaintiffs were taken for the purpose of making it, and as to these lands no dispute arose.

By an Act passed in 1853, and intituled "An Act to amend 'The Norfolk Estuary Act, 1846,' and 'The Norfolk Estuary Amendment Act, 1849,'" the powers of the company were extended for a further term, and the execution of the cut across the Vinegar Middle was again specially provided for.

In October, 1856, the company served the plaintiffs with a notice that they intended to take, under the powers of their Acts, certain pieces of land belonging to the plaintiffs, and containing about twenty-four acres. These pieces of land lay near the New Cut, but without the limits of deviation laid down in the deposited plans, and at a greater distance than 100 yards from the line of the cut as therein laid down. The company wanted them only for the purpose of taking earth from them in order to make the embankment across the Vinegar Middle, which was at the distance of more than two miles, and they did not allege that they required

the land for any other purpose. The plaintiffs being advised that the company had no authority to take land for such a purpose, filed their bill against the company to prevent their proceeding on the notice.

The case made by the company was, that the possession of the pieces of land in question was indispensable to the execution of their works, and that they were, *therefore, authorized by their acts to take them, as being lands "necessary for that purpose."

Their engineer deposed as follows: That the Vinegar Middle Cut in the said affidavit mentioned is required to be made through the shifting sands of the open wash of the sea, and that it is necessary to construct the banks thereof of clay or other stiff earth, to enable them to resist the scour of the tides, and that the said banks have already been partly constructed for the distance of about one mile of the said Vinegar Middle Cut, but have not yet been raised to a greater height than low-water mark; and that all the available clay and other stiff earth in the company's possession fit for the purpose have been exhausted in the formation of the said banks, so far as they have proceeded, and also in the formation of the bank across the old channel of the river Ouse, which bank is referred to in the 42d section of the Norfolk Estuary, 1846, and that it is absolutely necessary to the completion of the said Vinegar Middle Cut that a large further quantity of clay should be used in the formation of the banks thereof; that I have carefully surveyed the lands within the limits of deviation laid down on the said plans, and have had borings taken for the purpose of ascertaining where clay or other suitable material can be obtained, and that I am not aware of any other spot at which the same can be procured than the said pieces of land containing 24a. 2r. 24p.; that I have ascertained that the same lands do contain a large quantity of clay suitable to the purpose of constructing the said banks of the said cut across the Vinegar Middle, and I have no doubt that the greater part, and most probably the whole, of the clay which can be dug thereout will be required for the purpose of the same banks. I am unable to state with accuracy what *718 quantity will be required to form the banks, as it *will to some extent depend on what may be carried away by the action of the sea during the course of construction; but as the banks will be of very large dimensions, and must be formed of

great strength, a very great quantity of clay will necessarily be wanted; that, believing it to be essential to the prosecution and completion of the company's said works across the said Vinegar Middle that they should obtain the clay to be found in the said pieces of land, I advised the said company for that reason to purchase the same."

The Vice-Chancellor Wood having granted the injunction, the company appealed, and, as stated above, the cause was by arrangement treated as coming on for hearing.

Mr. Daniel, Mr. T. Stevens, and Mr. Bentinck, for the plaintiffs. — The question is whether these lands come within the description of "lands necessary for that purpose" contained in the 35th section of the first Act, *i.e.*, necessary for the purpose of making and maintaining the works authorized by the Act. The 35th section contains a recital upon which the enactment is founded. It is recited that plans had been deposited: this was that land-owners might have warning what lands might be taken by the promoters if the Act passed; and then the enactment founded upon it is that the company may make the line upon the lands in the plans, and may take such of them as are necessary for that purpose, *i.e.*, according to the natural construction for the purpose of making the works upon them. If the company are right in this case, a land-owner can never know until the compulsory powers are expired whether his land will be taken or not, though no part of the works in the neighbourhood of this land is unfinished. But if the words "for the purpose * of making the works" are * 719 construed more generally, still a conclusion in favour of the company cannot be come to without a latitude of construction quite foreign from the mode in which acts of this nature have always been construed. It is impossible to say that these lands are in any reasonable sense "necessary" for making the works. They may, it is true, be convenient for that purpose, but nothing more, for materials can be got elsewhere.

[THE LORD JUSTICE KNIGHT BRUCE. — The case you make is that the company wish in effect to insert at the end of the section some such words as, "or as may contain materials necessary for that purpose."]

That is precisely what we contend. Such materials as can be got from this land are necessary, but the land is not, for similar materials are to be had elsewhere. According to the contention of the defendants, if land is on the plan the company may take it as necessary for the execution of works situate twenty miles from it. The company will be confined strictly within their statutory powers. *Webb v. Manchester and Leeds Railway Company*, (a) *Innocent v. North Midland Railway Company*. (b)

Mr. Rolt and Mr. Surrage, for the company. — We admit that the company is bound to make out a clear case under the terms of the Act. It is true that we want this land for a purpose which is not permanent, and that we shall not require to keep it; but the 127th and following sections of the Lands Clauses Act show that the legislature contemplated a company's taking land which would not be permanently necessary. Now, as to the construction of the 35th section of the local Act, the word "necessary" * 720 must receive a reasonable * interpretation. It is of course not physically impossible to procure materials elsewhere, but they cannot be procured otherwise than from the land in dispute except at such a ruinous expense as will render the completion of the works practically impossible. The taking this land, therefore, is "necessary" for the purpose of making and maintaining the works. The contention that the section refers only to lands which are necessary for the purpose of making and maintaining the works upon them is, we submit, neither warranted by the words of the clause nor by the authorities. The clause provides that any such of the lands upon the plans and in the books of reference as are necessary for the purpose may be taken. Now the plans and books include lands not within the limits of deviation, and which, therefore, could not be taken for the purpose of constructing the works upon them. This shows that the words "for that purpose" cannot have the restricted meaning which the plaintiffs seek to put upon them. The cases show that land beyond the limits of deviation may be taken under the compulsory powers for the purposes of works authorized by the Act, though not strictly necessary. *Doe d. Payne v. Bristol and Exeter Railway Com-*

(a) 4 M. & C. 116; 1 Railw. Cas. 576.

(b) 1 Railw. Cas. 242, 256.

pany, (a) *Doe d. Armistead v. North Staffordshire Railway Company*, (b) *Sadd v. Maldon, Witham, and Braintree Railway Company*, (c) *Cotter v. Midland Railway Company*, (d) *Richards v. Scarborough Public Market Company*. (e) These cases, it is true, were cases in which the land was wanted for a collateral purpose which would require it to be permanently occupied; but we submit that there is no difference in principle between such cases and the present, for in each the land is required, * not for the purpose of making the line upon it, but for a * 721 collateral purpose necessary to the success of the undertaking.

Mr. Daniel, in reply. — “Necessary” cannot be construed in the way proposed by the appellants. The word applies properly to lands wanted to construct works upon, for the works cannot possibly be constructed without a site; but when you come to the taking land for the purpose of digging materials, the question becomes one merely of convenience, not of necessity.

Judgment reserved.

February 14.

THE LORD JUSTICE KNIGHT BRUCE. — Substantially the only question in this case is as to the true meaning of the last line of the 35th section of the statute of 1846, so often, not perhaps too often, mentioned during the argument. The defendants say in effect that the section ought to be construed as if the words “such of the said lands as may be necessary for that purpose” had not concluded it, but had been followed by the words “or as may contain materials fit and convenient to be used for that purpose,” a reading which cannot in my judgment be maintained. The meaning of the phrase “such of the said lands as may be necessary,” is, I think, “any of the said lands of which the site may be necessary.” I do not conceive that lands, mentioned in the section, can be considered as within the powers conferred by it, merely because containing materials capable of being extracted and used, however reasonably, in making or maintaining the cuts or works to which it refers. And here *I may notice the * 722

(a) 2 M. & W. 321.

(d) 2 Phill. 469.

(b) 16 Q. B. 526.

(e) 28 Law J. Ch. 110.

(c) 6 Exch. 143.

limitation of time enacted by the 90th section, which, though afterwards enlarged, will still not endure, I believe, beyond May, 1858; an observation which I make with reference to the word "maintain." Not any portion of the land in controversy is required for the purpose of forming in it, or constructing in or upon it any part of the cuts or works mentioned in the 35th section, or for the purpose of employing the site in supporting or assisting any part of those cuts or works. The defendants want the land for the mere purpose of extracting certain clay which the soil of it to a certain depth contains or consists of, and carrying away the clay when so extracted to a different and not adjoining site, and there using it for some other part of their works under the Act, for which part of the works they say (and I suppose truly) that clay is absolutely necessary; and they also say (and, as without being convinced I assume, accurately say) that they cannot obtain the clay indispensable for the purpose, otherwise than at a prodigious expense, unless from the land in dispute. All this is, I think, for every present purpose immaterial, although, in an affidavit made for the defendants, an engineer (I believe a highly respectable engineer) deposes thus: [Here his Lordship read the affidavit stated above.] This may possibly be as true as no doubt the deponent when swearing thought it to be; but if it is, what a spectacle does the case offer, when we consider that the company, having such various assistance as they must have had, and having obtained three Acts in three different sessions of Parliament, now stand as they do. The language in which they have moved the legislature to speak is, in my opinion, so far as the present suit is concerned, not with them in verbal expression or in spirit. The plaintiffs do not complain of the injunction as too narrow, and the

defendants having as I conceive no defence, the injunction
 * 723 must, I think, be made perpetual, and they * must pay the costs of the appeal motion, and all the other costs of a litigation into which they have driven the plaintiffs, and which therefore the defendants, who have unluckily for their shareholders been acting in the way too frequent if not customary with great bodies in this country, have wilfully brought down upon themselves.

THE LORD JUSTICE TURNER. — This case lies within a narrow compass. The sole question is whether the defendants, the Norfolk

Estuary Company, are entitled under the provisions of their Acts to purchase compulsorily some lands belonging to the plaintiffs, which are laid down and mentioned in the company's deposited plans and books of reference, but are not within the limits of deviation laid down in the plans, or within 100 yards from the line of the cut there laid down, for the purpose of excavating and removing therefrom the earth and soil in order to its being used in the formation of an embankment, part of the company's works, distant upwards of two miles from the lands proposed to be purchased. I am of opinion that the defendants, the Norfolk Estuary Company, are not so entitled.

The Act by which this company was constituted, incorporates the Companies Clauses Act, and the Lands Clauses Act, but it does not incorporate the Railways Clauses Act. The Railways Clauses Act contains provisions under which lands may be entered upon, occupied, and used for the purpose of obtaining materials for the construction of the works, but neither the Companies Clauses Act, nor the Lands Clauses Act contains any such provisions. These three Acts may well be considered to form part of a general scheme of legislation. The incorporation of the two latter Acts and the non-incorporation * of the former is, I think, * 724 strong to show that the powers contained in the former which are not contained in the latter were not intended to be given to this company. That it was not so intended is, I think, more evident from the circumstance that some of the clauses of this company's Acts appear to be taken from the Railways Clauses Act. The adoption of some and the non-adoption of others of the provisions of that Act is surely strong evidence that those which were not adopted were not meant to apply. We are bound, therefore, as I think, to consider that the legislature did not mean directly to give this company the power of entering upon, occupying, or using lands for the purpose of obtaining materials for the construction of their works. Can we then suppose that the legislature intended indirectly to give this power by enabling the company to purchase lands for the purpose? Very strong and clear language would, I think, be required to warrant this conclusion, more especially as acts of this description are to be construed in favour of the land-owner and not of the company. The question comes to this. Do the company's Acts contain provisions so strong and clear as to justify us in imputing this intention to the legislature?

I think it is plain that they do not. The 35th section of the first Act was mainly relied on. That section is as follows : [His Lordship read it.]

It was strongly argued upon this section that it gave power to purchase any of the lands delineated in the plan and described in the book of reference, which were necessary for making and maintaining the cut and works, and that in the modified sense which it was said must be attached to the word "necessary," these lands must upon the facts before us be taken to be necessary for that purpose ; but without deciding that the lands referred to in * 725 this section as the subject of purchase are the lands * referred to in the early part of the section as those through or over which the cuts and works appertaining thereto were proposed to be made ; although I rather incline to that opinion, it cannot, I think, be denied that it is exceedingly doubtful whether it was not so intended, nor can it, I think, be denied that it is, to say the least, doubtful whether the legislature intended to give to the word "necessary" the wide scope for which the company have contended ; or, indeed, whether the legislature had at all in contemplation the necessity or the means of obtaining materials for the construction of these works ; and under these circumstances I cannot venture to hold that this section gives any power to the company to take these lands for the purpose for which they propose to take them. It was attempted to fortify the argument upon this section by reference to the 5th section of the Act of 1853, passed after the Marsh Cut had been completed, and by reference also to the provisions contained in the Lands Clauses Act, for the sale of superfluous lands, but I think the inferences drawn from these enactments are far too uncertain to be relied on. Another argument, which was much pressed upon the part of the company, was derived from the power given them by their acts to take lands beyond the limits of deviation, but I think it is a sufficient answer to this argument that the limits of deviation apply to the canal, and that if the canal itself had been constructed nearer to those limits as it might have been, the works might of course have extended beyond those limits. Upon the whole, therefore, I think that the motion by way of appeal from the Vice-Chancellor, Sir WILLIAM PAGE WOOD, must be refused, and that upon the hearing there must be a decree for a perpetual injunction, and the company must pay the costs.

* BATES v. CHRIST'S COLLEGE, CAMBRIDGE. * 726

1857. February 23. Before the LORDS JUSTICES.

The rector of a parish filed a bill to recover certain tithes and lands as belonging to the rectory. The defendants answered as to the tithes, but refused by their answer to give any discovery as to the lands. *Held*, by the Lord Justice KNIGHT BRUCE (affirming the decision of Vice-Chancellor STUART), the Lord Justice TURNER doubting, that the defendants, having submitted to answer, could not refuse discovery as to the lands on the ground that the bill, so far as it sought relief as to the lands, was demurrable, as stating only a legal title in the plaintiff, without showing any grounds for equitable relief.¹

Per the Lord Justice KNIGHT BRUCE: In considering whether a defendant can, under the 38th Order of August, 1841 (Consolidated Order XV. 4), protect himself from answering, the relief asked by the bill must be considered as properly asked.

THIS was an appeal by the defendants from a decision of the Vice-Chancellor STUART allowing an exception for insufficiency to their answer.

The bill was filed for an injunction to restrain an action for rent, and to have the lease delivered up to be cancelled. The bill stated to the effect that in 1849, the defendants presented the plaintiff to the rectory of Burnham Westgate, along with a moiety of Burnham St. Margaret and a moiety of Burnham All Saints, and that he was inducted in the same year. That on the 14th February, 1851, the defendants granted to the plaintiff a lease of one moiety of the tithes within the parish of Burnham Westgate. That the plaintiff accepted this lease without having professional advice, and that he had subsequently discovered that he was entitled as rector to all the tithes in the parish, and that he, upon making such discovery, refused to pay rent for the moiety demised to him. That the defendants had taken possession of divers lands in the parish which properly belonged to the rectory, and had, as patrons or otherwise, obtained possession of all the title-deeds, maps, plans, and particulars relating to them, and refused to allow the plaintiff to inspect them. That the plaintiff did not know the metes

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 720-722, 3 id. 2114.

* 727 and bounds of the lands, and that * the defendants had let the lands and received large profits from them. The bill prayed for an injunction to restrain the defendants from proceeding with the action; that the lease of the moiety of the tithes might be delivered up to be cancelled; for a declaration that the plaintiff was entitled to all lands and tithes which were part of the rectory; that the defendants might be ordered to give up possession of the lands to him, and to deliver to him the deeds, maps, and plans relating to them, and that an account might be taken of the rents and profits received by them.

By the fifth interrogatory the defendants were asked as to existence of lands in the parish which were part and parcel of the rectory, and as to their having, as patrons or otherwise, obtained possession of the title-deeds relating to them, and as to their having let the lands.

The defendants by their answer set out various details as to the title to the consolidated benefice (consisting, as they alleged, of a moiety of Burnham Westgate, a moiety of Burnham St. Margaret, and a moiety of Burnham All Saints) to which they had presented the plaintiff, and claimed title as impropiators to the other moiety. They stated that there was a piece of land in the parish part and parcel of the latter moiety of the rectory which had been conveyed to them by a certain ancient deed, and that ever since the date of that deed they had been in possession of the piece of land. They denied that the plaintiff had any interest in it, and submitted that they were not bound to set out the particulars of it, nor whether they had, otherwise than as such patrons in the bill mentioned, obtained possession of the title-deeds, &c., relating to it; but they denied having, as such patrons, obtained possession of any deeds, &c., relating to it, and stated that they had not any docu-

* 728 ments * showing or tending to show that the plaintiff had any interest in it. They declined to answer whether they had let the land, or to set forth any list of deeds, &c., relating to the land, or a description of it by metes and bounds, or in whose possession it was, or at what rent, or whether they had received any sums for rent.

The plaintiff excepted to the answer to the above interrogatory, insisting that the defendants were bound to give full discovery as to the lands forming part of the rectory, and the exception was allowed by the Vice-Chancellor STUART.

Mr. Malins, Mr. Elmsley, and Mr. Evans, for the defendants. — We say that as regards the glebe lands the plaintiff cannot have discovery on such a bill as this, though a mere bill for discovery might lie. The case as to these lands is that of a purely legal title, without any grounds for coming to a Court of Equity, and no relief can be had as to them. We not only deny the plaintiff's title, but set up a title of our own, and are not bound to answer further. *Mitford on Pleadings*, (a) *Cardale v. Watkins*, (b) *Jones v. Jones*, (c) *Attorney-General v. Corporation of London*. (d)

Mr. Bacon and Mr. Batten, for the plaintiff. A denial of the plaintiff's title does not take away the liability to give discovery. *Adams v. Fisher*, (e) *Swinborne v. Nelson*. (g) We were obliged to come into equity as to the tithes; for, having accepted a lease of them, the * plaintiff is estopped at law from deny- * 729 ing the title of the defendants to them, and the case as to the glebe lands being connected with the other part of the case by the relation in which the parties stand to each other, viz., that of patron and incumbent, is properly included in the suit. The defendant having submitted to answer must answer fully, and cannot excuse himself by saying that we are not entitled to any relief as to the glebe lands. If he wished to avoid discovery on that ground he should have demurred to that part of the bill.

[The Lord Justice KNIGHT BRUCE referred to the 38th Order of August, 1841. (h)]

It was decided in *Mason v. Wakeman*, (i) upon the construction of that order, that a defendant who submits to answer cannot under it protect himself from answering on the ground that the bill is demurrable.

[THE LORD JUSTICE TURNER. — Does that case decide any thing more than that a defendant cannot decline answering a particular interrogatory because he might have demurred to the whole bill?]

(a) Page 311 (4th ed.).

(b) 5 Mad. 18.

(c) 3 Mer. 161.

(d) 2 Mac. & G. 247.

(e) 3 M. & C. 526.

(g) 16 Beav. 416.

(h) Cons. Order XV. 4.

(i) 2 Phill. 516.

The reasoning of Lord COTTENHAM goes beyond that, and *Padley v. Lincoln Waterworks Company* (a) is also in our favour. The principle is, that the 38th Order of 1841 applies only where the interrogatory is one to which the defendant could have demurred under the old practice, and that, we submit, he could not have done here. For the purposes of that order, if there is no demurrer, it must be assumed that the relief asked is such as may be granted. The order was intended to apply only to cases where a demurrer to discovery would lie, though not a demurrer to the relief. [*Dott v. Hoyes* (b) was also referred to.]

Mr. Elmsley, in reply, referred to *Baddeley v. Curwen*. (c)

* 780 * THE LORD JUSTICE KNIGHT BRUCE. — If not any part of the relief asked by this bill ought for the purposes of this discussion to be considered objectionable or improper, it is clear that the defendants must answer the interrogatory which they have declined to answer. My opinion is, that on the true construction of the 38th Order of August, 1841, which was so much considered by the Vice-Chancellor Sir JAMES WIGBAM and myself, and afterwards by Lord COTTENHAM, all the relief asked must, for the purposes of this discussion, be considered to be properly asked: though it may possibly in another stage of the clause be considered to have been improperly asked, — as to which I give no opinion, — it cannot, I think, be so deemed now. In my judgment, therefore, the Vice-Chancellor has come to a correct conclusion. The question, however, is open to so much doubt, and the mode in which it has been brought forward is such, that had I been in the place of the Vice-Chancellor I should have reserved the costs till the hearing; I think, therefore, that the order of the Vice-Chancellor ought to be affirmed as regards the allowance of the exceptions, but that the costs should be reserved till the hearing of the cause, to be dealt with according to the discretion of the Judge before whom it shall be heard.

THE LORD JUSTICE TURNER. — I quite agree in the proposed variation of the order as to costs, but as to the question of insufficiency I am not so well satisfied. Probably on further consideration I

(a) 2 Mac. & G. 68.

(b) 15 Sim. 372.

(c) 2 Coll. 151.

might concur in the view of my learned brother and the Vice-Chancellor, but at present I am not prepared to give an opinion on the point. As, however, my learned brother agrees with the Vice-Chancellor on the principal question, and I agree with him as to costs, the order will be as he proposes.

* HOPE v. HOPE.

* 781

1857. February 12, 14, 16, 27. Before the LORDS JUSTICES.

When a Court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter, for if any part of the contract be inconsistent with the law and policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed.

Therefore, where an Englishman married a Frenchwoman, and they resided in France, where their children were born, and suits were instituted between them in both countries, and were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, and another part was, that one of the children should remain with his mother, and a third part related to the payment of an allowance to the wife: *Held*, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it.¹

THIS was an original hearing of a demurrer by the defendant John Adrian Hope to an amended bill filed by his wife Mathilde Emilie Hope. The substance of the case stated by the original bill was as follows:—

The marriage between the plaintiff, who was a Frenchwoman, and the defendant, who was an Englishman, took place, in 1845, in England. For some years after the marriage the husband and

¹ See Fry Spec. Perf. (2d Am. ed.) 70, 506–508; Chitty Contr. (10th Am. ed.) 95, n. (d); Story Conf. Laws, § 244; Smith v. Godfrey, 28 N. H. 379; Greenwood v. Curtis, 6 Mass. 358, 362 n.; Thrasher v. Everhart, 3 Gill & J. 234; De Sobrey v. De Laistre, 2 Harr. & J. 193; Whiston v. Stodder, 8 Martin, 95.

wife resided in France, where they became domiciled, and where their five children were born. In consequence of differences which arose between the plaintiff and the defendant, the latter, in the early part of 1853, sent all the children to England, but on the 21st of May in that year the two youngest, Adrian Elias and John Henry, were allowed by the defendant to be taken back to France, and were restored to Mrs. Hope. Proceedings took place before the French tribunals with respect to the custody of the children, and in August, 1853, the plaintiff instituted a suit against her husband in the Consistory Court of London in order to obtain a decree of divorce on the ground of cruelty and adultery, to which Mr. Hope filed a responsive allegation. On the 11th of November, 1853, the five infant children filed a bill in chancery by their next friend, praying that Mrs. Hope might be ordered to

* 732 * deliver up Adrian Elias and John Henry to their father in order that they might be brought up and educated in England, and on the 7th of June, 1854, the Lord Chancellor made an order in that suit that Mr. and Mrs. Hope should take all such steps as might be necessary and proper according to the law of France to cause the children to be delivered up to their father, but that he should permit Mrs. Hope to have access to them at all reasonable times. (a) Mrs. Hope presented a petition of appeal to the House of Lords from this order. In the mean time, by a decree of the Cour de Première Instance at Paris, dated the 21st of December, 1854, it was directed that the order of the Lord Chancellor should be carried into execution, but that pending Mrs. Hope's appeal the children should be placed at a school in Paris, where both their father and mother should have liberty to see them. Mrs. Hope appealed against this order to the Cour Impériale; but before either appeal came on to be heard an arrangement was made between her and her husband for the settlement of all matters in dispute, and ultimately an agreement was drawn up in the French language, which was executed by Mrs. Hope at Paris, on the 20th of March, 1855, and by Mr. Hope in London on the 22d. The bill set out a translation of the agreement, which was in the following terms:—

“By a judgment delivered by the Civil Tribunal of the Seine, dated 27th December, 1854, it was declared that there should

(a) See 4 De G., M. & G. 329.

be executed in France a judgment of the Lord Chancellor of England, which ordered that Mrs. Hope should be bound to deliver up to Mr. Hope the two sons issue of their marriage, Messrs. Adrian Elias and Jean Henry Hope. Mrs. Hope has appealed against this order; but, for the purpose of putting an *end to these painful proceedings, the following terms * 733 have been entered into by the parties: 1. Mrs. Hope will immediately deliver up to Mr. Hope Mr. Adrian Elias Hope; Mr. Jean Henry Hope will remain under the care of his mother. 2. Mrs. Hope will abandon her suit for a divorce instituted against Mr. Hope in the English courts, and for that purpose she binds herself to sign without delay all such deeds and documents as may be required. 3. Mrs. Hope undertakes not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but on the contrary to facilitate the obtaining such divorce. It is well understood that Mrs. Hope shall be able to see her children, to write to them, and to receive letters from them. 4. Mr. Hope agrees to pay in France to Mrs. Hope the annual sum of 75,000 francs in accordance with the decision of the Ecclesiastical Court, to be paid quarterly and in advance. 5. Mr. Hope undertakes to pay, firstly, the expenses incurred in England by Mrs. Hope, and, secondly, Mrs. Hope's debts in France, but on condition that such debts shall not exceed the sum of 60,000 francs. These payments shall be made by the hands of Mr. Hope's agents. 6. With regard to any accounts that may be unsettled between Mr. and Mrs. Hope, as well as the handing over to her any articles that may belong to her, the parties agree to leave the matter to be settled by Messrs. Paillet & Duvergier, whose decision shall be final."

In pursuance of this agreement the plaintiff brought Adrian Elias Hope to England and delivered him up to Mr. Hope, John Henry remaining with her at Paris, and she withdrew her appeals both in this country and in France. Mrs. Hope's suit in the Ecclesiastical Court and the responsive allegation of Mr. Hope were both dismissed.

* The bill went on to allege that the plaintiff had in all * 734 respects performed her part of the agreement, but that the defendant had refused to perform his part of it; that he refused the plaintiff all access to the children, though she had frequently desired to visit them, and that he had paid no part whatever of the

promised annuity, of the costs incurred by the plaintiff, or of the sum on account of her debts. The bill prayed a specific performance of the agreement of March, 1855, that the plaintiff might have access to her children at all reasonable times, that an account might be taken of the arrears of the allowance stipulated for by the agreement, and that the defendant might be ordered to pay such arrears and to give security for future payments and to pay the costs of the suit.

The defendant demurred to this bill for want of equity, and the Master of the Rolls overruled the demurrer. (a) An appeal by the defendant came on to be heard before the Lords Justices in July, 1856, and their Lordships having intimated an opinion that if the demurrer were allowed leave must be given to amend, it was arranged that the demurrer should be allowed without prejudice to any question and with leave to the plaintiff to amend her bill, and that if the defendant should demur again the demurrer should be brought directly before the Court of Appeal.

The bill accordingly was amended by introducing statements to the following effect: That the defendant resided in England, and that by his refusal to perform his part of the agreement the plaintiff was reduced to destitution—that if proceedings could be instituted in the courts of France the defendants would be * 785 decreed to * pay the allowance and the other sums mentioned in the agreement. That it was the intention of both parties that the agreement should be valid and binding on both of them in England as well as in France, and that the plaintiff had acted on the faith of its being so binding. That by the French law regard would be had to the circumstances under which the agreement was entered into, and that it would be carried into effect by the French tribunals against the defendant if he were still a resident in that country, and that although Monsieur Paillet, one of the referees named in the agreement, had since died, the plaintiff was willing that it should be carried into execution in any manner which the Court might direct. The defendant again demurred.

Mr. Roundell Palmer, Mr. Kenyon, and Mr. Amphlett, for the demurrer. — We contend, in the first place, that there was here no effectual contract, by reason of the incapacity of the wife to contract. The bill does not contain allegations sufficient to show

(a) 22 Beav. 351.

that the instrument is one governed by French law ; if it did, the capacity of the parties to contract would have to be judged of according to that law ; but as matters stand it must be judged of by English law, there being no distinct averment that the parties were domiciled in France at the time of the contract. Now, by the law of England, there cannot be an effectual contract between husband and wife for the purpose of separation without the intervention of a third party. The Court will carry into effect contracts ancillary to separation, but only where they are entered into by parties able to contract. *Legard v. Johnson*, (a) *Worrall* * v. *Jacob*, (b) *Elworthy v. Bird*, (c) *Roper's Husband and* * 786 *Wife*, (d) *Warrender v. Warrender*, (e) *Marshall v. Rut-*
ton, (g) *Lord St. John v. Lady St. John*. (h)

In the next place, we say that the contract, supposing it to fall under French law, and to be binding according to that law, is one which cannot be enforced here, as being contrary to public policy. It is a sale of a divorce for a pecuniary consideration. The marriage was an English marriage, and the parties could not, by becoming domiciled abroad, alter, in a way to be recognized by our Courts, their matrimonial obligations. A contract like this, if entered into between English persons, would be wholly invalid as founded on an illegal consideration: *St. John v. St. John*, (i) *Earl Westmeath v. Countess Westmeath*, (k) *Warrender v. War-*
render ; (l) and our Courts will not enforce here a contract of such a nature, though made abroad between subjects of a country in which it would be held binding.

Thirdly, we say that as the agreement provides for a settlement of matters by two arbitrators, one of whom is dead, the contract cannot be performed. *Milnes v. Gery*, (m) *Blundell v. Bret-*
targh, (n) *Morse v. Merest*. (o) Moreover, the case being one in which the Court could not compel the plaintiff to perform her part of contract, it will not enforce any part of it. *Gervais v. Edwards*. (p)

(a) 3 Ves. 352.

(b) 3 Mer. 268.

(c) 2 S. & S. 372.

(d) Vol. II. p. 293.

(e) 2 Cl. & Fin. 488, 527.

(g) 8 T. R. 545.

(h) 11 Ves. 525, 531.

(i) 11 Ves. 525.

(k) Jac. 126.

(l) 2 Cl. & Fin. 488.

(m) 14 Ves. 400.

(n) 17 Ves. 232.

(o) 6 Madd. 26.

(p) 2 Dru. & War. 80.

[The Lord Justice KNIGHT BRUCE referred to *Lumley v. Wagner*. (a)]

That case was put by Lord ST. LEONARDS expressly on the negative stipulation.

* 737 * Lastly, this is a mere money demand, and the remedy, if any, is at law.

The Attorney-General (Sir R. BETHELL) and *Mr. T. H. Terrell*, in support of the bill. — The case on the bill is, that every thing has been done by Mrs. Hope which she agreed to do, and that no part of the contract is left unperformed except payment by Mr. Hope. The contract was made in France between persons domiciled in France and for payment in France. It is a contract to be judged of by the law of the country where it was made and was to be performed. *Dalrymple v. Dalrymple*. (b) Even if a French domicile is not sufficiently alleged, there is enough to show that it was a French contract. Where the contract is made and where it is to be performed are the main points to be looked to. Story's Conf. Laws. (c) It is quite possible for two domiciled Englishmen to enter into a contract which must be construed according to French law. Here the contract was essentially French, it was drawn up in that language, all the negotiations relating to it took place in Paris, and nothing was done in England but the formal act of signature by Mr. Hope. The contract is alleged by the bill to be binding by French law, and that being an allegation of fact, not of law, must, for the purposes of demurrer, be taken to be true, and it therefore ought to be enforced here, unless it can be shown to be clearly contrary to morality or public policy. But we contend that, taking it to be an English contract, it is not void, either on the ground of public policy or of want of ability to contract. The Court does not regard an agreement for separation as any thing illegal; it does not enforce it, for that would

* 738 be interfering with the province of the * Ecclesiastical Courts, but it enforces its ancillary provisions: *Wilson v. Wilson*; (d) and the Court has gone very near to enforcing an agreement for separation itself. *Sanders v. Rodway*. (e) The

(a) 1 De G., M. & G. 604.

(d) 5 H. L. Cas. 40, 59, 60.

(b) 2 Hag. Cons. 54.

(e) 16 Beav. 207.

(c) 4th ed. §§ 242, 480.

principles on which the Court acts are laid down in *Wilson v. Wilson*, (a) *Bateman v. Countess of Ross*, (b) *Toovey v. Lindsay*. (c) Then there was power to contract, for where there is a right to sue there must be a right to contract as to abandoning the suit: *Elworthy v. Bird*, (d) *Angier v. Angier*; (e) and the agreement by the wife to abandon her suit for a divorce, which she has done, is a valuable consideration. *Hewison v. Negus*. (g) The contract not to oppose Mr. Hope's proceeding for a divorce was not illegal; the divorce Court could not be misled, for the evidence had all been taken, and the Court would only act on the circumstances, not on the consent of the parties. The Court is not precluded from performing part of a contract: *Hill v. Crolls*; (h) especially when every other part of it has been performed. *Lumley v. Wagner*. (i)

THE LORD JUSTICE KNIGHT BRUCE. — It is my opinion, and I believe it is the opinion also of the Lord Justice, that by reason of the want of consideration, and not for that reason only, this contract, if treated as an English contract, is one on which this Court cannot act. It has been urged, however, that the French law is the law applicable to the case, and that it is sufficiently alleged in the bill that the case is one which must be treated as governed by that law. On this point we shall be glad to hear a reply.

* THE LORD JUSTICE TURNER. — I also am of opinion that * 739 if this contract is looked at as one governed by the law of England, the Court cannot act upon it. I do not think that the case of *Wilson v. Wilson* (k) contains any thing impeaching the authorities as to the incapacity of the husband and wife to enter into such a contract without the intervention of a third party.

Mr. Palmer, in reply. — The capacity to contract is governed by the *lex loci contractus*, which here must be considered to have been English. But, independently of this argument, the Courts of no country are bound to enforce a contract which is against the

(a) 1 H. L. Cas. 538-573.

(b) 1 Dow, 235.

(c) 1 Dow, 117.

(d) 2 S. & S. 372, 380.

(e) Prec. Ch. 497.

(g) 16 Beav. 594.

(h) 2 Phill. 60.

(i) 1 De G., M. & G. 604.

(k) 5 H. L. Cas. 40.

policy of the law of the country in which it is sought to be enforced, although the contract may be valid according to the law of another country where it was entered into. Burge Col. Laws. (a) The stipulation as to the divorce suit is illegal as being against morality and public policy; the rest of the agreement is connected with it, and the whole must fall together. Moreover, the Court will not perform a contract partially.

Judgment reserved.

February 27.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I adhere to the opinion already expressed, that if the document of 20th and 21st March, 1855, upon which the bill proceeds, ought to be deemed an English contract in the sense of being liable to be construed according to English principles and rules, and either *740 valid or invalid as those principles and rules * dictate, the document as founded on an unlawful, if on any, consideration is good for nothing and the demurrer plainly right. But ought the document to be deemed, not merely in language, but also in substance, a French contract, and thus to be construed and have effect upon the principles and according to the rules of the French law, and consequently valid or invalid as they dictate, if at least it contains not any material provision tending directly to infringe within England the policy of the English law? And, secondly, does the bill state with sufficient fulness or distinctness what the rules or principles of the French law are so far as the suit or its subject is concerned? And, thirdly, does the document contain any material provision tending directly to infringe within England the policy of the English law? In my opinion not one of these three questions can be answered favourably for the plaintiff. It is true that the document is in the French language (a translation only being given by the bill), that the plaintiff is a native of France and signed it in that country, and that the domicile of the parties, when each of them signed it, must probably upon the bill be taken, but certainly is by me assumed, to have been French. Their marriage took place, however, in England, where the defendant, an Englishman by birth, signed the document, and

(a) Vol. III. p. 779.

where an important portion at least of its provisions was to be carried into effect, and the bill does not, in my judgment, state enough to show that the French law was meant or ought to regulate or decide the manner of construing or dealing with it.

If, however, the first of these three questions ought to be answered for the plaintiff and not against her, still it does not seem to me that the bill explains or alleges the French law sufficiently. But whatever knowledge of the state of the French law we ought to impute to * ourselves, — whatever we ought * 741 to take that state as being, — I am certainly not of opinion that the stipulation in the document respecting Jean Henry Hope (whom we must, I think, consider as still an infant and still a ward of this Court, and, though born in France, not an alien), and the 3d article of the document (that containing the word “facilitate”) can be rendered sustainable in an English Court of justice by ascribing a French domicile, a French character, and (if I may so express myself) French intentions to the document. It appears to me that the demurrer ought to be allowed, but without costs.

The plaintiff cannot have leave to amend the bill, nor probably indeed do her advisers wish it; our former order (whether too favourable to her or otherwise) having given them ample opportunity to place the record in the state in which it might best suit them to present it to the House of Lords in the event of the case being taken thither; and this I must suppose to be the actual condition of the bill.

THE LORD JUSTICE TURNER. — This is a suit instituted by a wife against her husband for the specific performance of an agreement entered into between them. The bill has been met by a general demurrer for want of equity. In the course of the argument before us, my learned brother expressed our united opinion, that if the law of this country only was to be taken into consideration in determining the case, the agreement could not be supported, and the demurrer must consequently be allowed, and we stopped the reply upon that point. The further consideration which I have since given to the subject has confirmed me in that opinion.

* But it was argued for the plaintiff, in support of the bill, * 742 that in determining this case the law of France ought also to be taken into consideration, — that the agreement in question ought to be considered as an agreement entered into, or, at all

events, to be performed, in France, — that it is valid and capable of being enforced in France, and that effect ought therefore to be given to it by the law of this country, and upon these points we reserved our judgment.

Upon carefully examining the allegations of this bill, on which alone the case, being before us upon demurrer, must be decided, I think it far from clear that the bill alleges such a case as would in strictness warrant us in taking the law of France into consideration. But I should not feel satisfied to dispose of the case finally upon that ground, and I think it better, therefore, to consider it upon the assumption that the law of France is to be taken into account, and that the agreement in question would, according to that law, be capable of being enforced. Laying aside, then, the allegations of the bill which point to the introduction of the French law into the case, the bill alleges these facts: [His Lordship stated in order the substance of the allegations in the bill.]

No argument was addressed to us on the plaintiff's behalf with reference to that part of the bill which applies to the plaintiff's having access to her children, and seeks for relief in that respect. This part of the plaintiff's complaint, if well founded, is properly the subject of application in the suit in which the order for access has been made. That order having been made, the right given by it and the enforcement of that right cannot, as I apprehend, under any circumstances appearing upon this bill, properly be

* 743 made the subject of a distinct suit, * and the bill can derive no support from the introduction into it of this part of the case. The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds I think that when the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it. Now, there are two provisions of this agreement which, as it seems to me, are

contrary to the law and policy of this country. By art. 1 of the agreement one of the children is to remain under the care of the plaintiff, the mother. By art. 3 of the agreement, Mrs. Hope, the plaintiff, undertakes "not to oppose the suit for a divorce instituted against her by Mr. Hope in the English Courts, but, on the contrary, to facilitate the obtaining such divorce." Are these provisions consistent with our laws and policy?

The first of them is in contravention of the order of the Lord Chancellor stated in the bill. It is not only in contravention of that order, but, as I apprehend, is in contravention also of the settled law and policy of the country. The law of this country gives to the father the custody of the children and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties and with reference to the public welfare. Lord ELDON, speaking upon this * subject in *Lord St. John v. Lady St. John*, (a) says * 744 this: "Then how is it as to the children? The father has control over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration, before a Court of Law should by *habeas corpus* upon a unilateral covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them, against his will, in the hands of his wife." And again, in *Lord Westmeath's Case*, (b) Lord ELDON, upon *habeas corpus*, ordered two children of very tender years to be delivered to their father, notwithstanding an express agreement on his part that they should reside with their mother and be educated under her care and superintendence. I know of no authority contravening the doctrine thus laid down and acted upon by Lord ELDON, and I have no doubt, therefore, that this first article of the agreement is repugnant both to the law and policy of this country. That there may be circumstances which would justify such an agreement as this article contains it is not necessary to deny. No such circumstances are alleged by this bill.

(a) 11 Ves. 531.

(b) Jac. 251.

Then, as to the 3d article of the agreement. There is nothing which the Courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families — the welfare of * 745 children, depends, * to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the legislature, but divorces *à mensâ et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view and the means by which that object is to be effected. Its object is the discontinuance of the marital relations without, so far as appears by this bill, any sufficient cause for the purpose, for the bill states no more than that there was a suit by the plaintiff for a divorce and evidence taken upon it, and that upon that evidence the responsive allegation, the purpose of which is not stated, was dismissed; and the means by which this object is to be effected are, as I understand this agreement, by evading the due administration of justice in the Courts of this country. Much of the argument on the part of the plaintiff was, and most properly, addressed to this part of the case. It was said that the wife's assistance in obtaining the divorce could be of no avail, for that the Ecclesiastical Court would not in such cases act upon the consent of the parties; but there are other modes of rendering assistance than by consent, — modes, too, of which the Court may have no cognizance. But then it was said that the whole of the evidence had been taken in the suit, and that there could, therefore, be no deception upon the Court; but it is one thing to take evidence, another to dissect and scrutinize it and lay it before the Court. It was further said on the part of the plaintiff, * 746 that the * proposed divorce would amount to no more than a separation, and that the law of this country recognizes separations between husband and wife; but I am very far indeed from being satisfied that the law of this country would recognize a separation upon such an agreement as this between

the husband and wife alone, and besides there are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely. Giving full weight, however, to all these arguments on the part of the plaintiff, they furnish no answer to the objection that this is an agreement for evading the due administration of justice in England.

Lastly, it was urged on the plaintiff's behalf, that whatever objection there may have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this Court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent.

Upon these grounds, without entering more into the other points which were argued before us, my opinion is that this demurrer ought to be allowed.

* BRANDLING v. PLUMMER.

* 747

1856. December 19, 20. 1857. February 23. Before the LORDS JUSTICES.

Where a docket of a judgment did not set forth the number roll, but this appeared on the entry of the issue in the same book: *Held*, by Lord Justice TURNER, affirming the decision of Vice-Chancellor KINDERSLEY, *dubitante* Lord Justice KNIGHT BRUCE, that the judgment did not, within 4 & 5 Will. & Mary, c. 20, affect a purchaser, and that he was not precluded from disputing its validity by the circumstance of a conveyance under which he claimed title, and which was a trust deed for the benefit of creditors, and was executed after the judgment was entered up, being expressed to be made subject to the incumbrances affecting the estates conveyed.¹

THIS was an appeal from an order of Vice-Chancellor KINDERSLEY, dismissing a petition presented for the purpose of obtaining the benefit of a judgment for 9000*l.* against estates of Ralph Henry Brandling, the question being, whether the provisions of the Stat. 4 & 5 Will. & Mary, c. 20, relating to the docketing of judgments, had been sufficiently complied with.

¹ See 1 Dart V. & P. (4th Eng. ed.) 421, 422; Sugden V. & P. (14th Eng. ed.) 528.

On the 14th of July, 1835, Messrs. Roberts & Curtis, who were already mortgagees of some parts of the real estate of Ralph Henry Brandling, under a mortgage made by his father, obtained judgment against him for 9000*l.*, and took the usual steps for having it docketed.

The docket-book for Trinity term, 1835, contained the following entry: —

London.	Judgment — Case P. Conf.	Brandling, Ralph Henry, clk, <i>ats</i> Abraham Wildy Roberts and another, surviving partners, &c. Reyroux, 40.
---------	-----------------------------	--

Eleven pages further on, in a part of the book appropriated to issues and judgments not final, the following entry occurred: —

London.	Issue — Case.	Brandling, Ralph Henry, clk, <i>ats</i> Abraham Wildy Roberts and another, surviving partners, &c.	833
---------	---------------	--	-----

* 748 * The number 833, in the second entry, was what is termed the “number roll,” *i.e.* the number denoting the roll in which the judgment, &c., is to be found. This number was not affixed to the first entry.

On the 31st of December, 1835, Ralph Henry Brandling and his son conveyed various estates to trustees upon trusts for the benefit of creditors parties to the deed, the estates being conveyed “subject to the charges and incumbrances affecting the same.” Another debt due from Ralph Henry Brandling to Messrs. Roberts & Curtis on judgment, was mentioned in this deed as an incumbrance; but the judgment to which the present appeal related was not specifically referred to. Messrs. Roberts & Curtis did not take the benefit of this deed, nor were they named as parties to it. The present suit was instituted to carry into execution the trusts of that deed, and the petitioners, who had taken an assignment of the securities of Messrs. Roberts & Curtis, presented a petition to obtain the benefit of them. The persons who claimed as purchasers under the trust deed raised several objections to this claim, the objection, so far as related to the judgment, being, that owing to the omission of the “number roll” the judgment was imperfectly docketed, and therefore void against purchasers. The Vice-Chancellor KINDERSLEY acceded to this view and dismissed the petition. The petitioners appealed.

Mr. Anderson, Mr. Rockfort Clarke, and Mr. Rasch, for the appellants. — *Braithwaite v. Watts* (a) is relied on against us, but that case merely decided that docketing the issue was not a sufficient compliance with the requisitions of the *statute, * 749 there being no entry at all of the judgment. Here there is an entry of the judgment without the number roll, but even that taken alone without reference to the other entry gives the purchaser notice of the existence of the judgment, which is the substantial object of the statute. *Evans v. Thomas*. (b) Taking the two entries together, they make a complete entry, satisfying the strictest construction of the statute, a purchaser being able by an ordinary search to discover all the particulars which the legislature can have intended him to have. Construing the Act without unreasonable strictness, it may well be held that the provisions as to the particulars to be entered are directory only. Its terms are very different from those of the Annuity Act, 53 Geo. 3, c. 141, and the Court will not be inclined to defeat a just claim by an over-strict adherence to the letter of a statute when its spirit is satisfied. *Hawkins v. Gathercole*. (c) The purchasers by the terms of their conveyance took subject to all incumbrances, and therefore to this judgment.

Mr. Glasse, Mr. W. D. Lewis, and Mr. Joyce, for the plaintiffs. — The Act in express terms requires that a judgment shall be docketed by entering certain particulars, of which the “number roll” is one, and makes it void against purchasers if it is not so docketed, and the Court cannot dispense with any of these particulars on the ground that some other mode of entry would serve the purposes of the statute just as well.

[THE LORD JUSTICE TURNER. — May not the two entries be taken together as constituting one complete entry?]

According to *Braithwaite v. Watts*, (d) and *Doe v. * Purchas* (e) we submit that the language of the statute * 750 cannot be so departed from. After the decision in the former case a purchaser never would take the trouble to search

(a) 2 Cr. & J. 318; 5 B. & Ad. 1056; 2 Tyr. 293.

(b) 2 Str. 833.

(d) 2 Tyr. 293.

(c) 6 De G., M. & G. 1.

(e) 2 Harrison & Wollaston, 50.

for issues, and the statement in the margin, that this judgment was by confession, would lead him to suppose that there was no issue, so that he would not be likely to discover this second entry in a part of the book not containing judgments. The fact of the conveyance being made subject to incumbrances cannot help the petitioners; those words only refer to such incumbrances as can be enforced against the purchasers.

Mr. Swanston, *Mr. Schomberg*, and *Mr. Freeling* appeared for other parties.

Mr. Anderson, in reply.

Judgment reserved.

1857. February 28.

THE LORD JUSTICE TURNER. — The principal question upon which we reserved our opinion in this case was, whether the judgment, to the benefit of which the appellants claim to be entitled, was so docketed and entered as to affect the estates in question as to purchasers or mortgagees. This question depends upon the Statute 4 & 5 William & Mary, c. 20. By that statute, after reciting that great mischiefs and damages happen and come to persons in their lifetimes, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees, by judgments entered upon record in the Courts at West-

* 751 minster, * by reason of the difficulty there is of finding out such judgments, it is enacted “That the clerk of the essoigns of the Court of Common Pleas, every clerk of the dockets of the Court of King’s Bench, and the master of the office of pleas in the Court of Exchequer for the time being, shall, before the last day of Easter term next coming, and so in every Easter term after, make, or cause to be made, and put into an alphabetical docket, by the defendant’s names, a particular of all judgments for debt by confession, *non sum informatus* or *nihil dicit*, entered in the said respective Courts of the term of St. Hilary preceding, which shall contain the name and names of the plaintiff and plaintiffs, the name and names of the defendant and defendants, his, her, or their place or places of abode, and title, trade, or profession (if any such be in the record of the said judgments), and the debt,

damages, and costs recovered thereby, and in which county, city, or town the respective actions were laid, and the number roll of the entry thereof." Then follow directions to the clerks of the judgments of the several courts to bring in the other judgments which have been entered up, and which are not judgments by confession, *non sum informatus* or *nihil dicit*; and then there follow provisions for the same entries of the judgments to be made in other terms, and also for the continuance of those entries. Then by section 3 it is enacted "That no judgment not docketed and entered in the books as aforesaid shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates."

By the 3d section, therefore, the judgment is not to affect lands and tenements as to purchasers or mortgagees, * unless * 752 it is docketed and entered in the books in the manner prescribed by the 2d section.

The judgment as to which the question arises was a judgment by confession in an action brought in the Court of Queen's Bench, and the entry of the judgment in the docket book does not contain the number roll of the entry of the action; but it appears that it has been the practice of the officers of the Court of Queen's Bench, by whom the docket books have been kept, to enter in those books not merely dockets of the judgments, but dockets of the issue also, where issue has been joined in the actions; the practice having been to enter in an alphabetical list by the defendants' names, first, the final judgments obtained in each term, and then in a consecutive series the issues and the judgments not final of the same term; and in this particular case it appears that, issue having been joined and judgment confessed in the action in the same term, there are in the docket book of that term two entries, one of the judgment, which, as I have already mentioned, does *not* contain—and the other of the issue, which does contain—the number roll of the entry of the action; the two entries, however, although under the same letter, being separated by a considerable number of entries of other judgments and issues.

Under these circumstances it was held by the Vice-Chancellor Sir RICHARD TORIN KINDERSLEY, that the judgment was not so docketed and entered as to bind lands in the hands of purchasers or mortgagees. Two points were mainly relied upon on the part

of the appellant: first, that the statute, so far as it relates to the docketing the number roll of the entry of the action, is merely directory; and, secondly, that, assuming it to be imperative, * 753 the docket of the issue, which contains the number roll of the entry of the action, ought to be taken with the docket of the judgment, and there is thus a complete docket of the judgment upon the most strict construction of the statute. I am of opinion, however, that the appellant has failed to establish either of these points. The third section of the statute is plainly imperative, and it embodies within it all the provisions of the second section. It must be read, I think, as if those provisions had been repeated in the section itself, as if the language had been that no judgment should affect lands as to purchasers or mortgagees unless entered in the books in alphabetical order by the defendant's name with the names of the plaintiff and defendant, their place of abode, title, trade, or profession (if appearing by the record), the debt, damages, and costs, county, city, or town, and the number roll of the entry; and had such been the language, I do not see how any Court could have been justified in holding a judgment to be binding as to purchasers, in the entry of which any of these particulars were wanting. It was said that the number roll of the entry of the action was no part of the judgment; but the question is not whether the number roll is part of the judgment, but whether it is part of what the legislature required to be contained in the docket, and of this there can be no doubt. Again it was said that the entry of the number roll would in many cases be of no importance, as to the judgments in many cases are not made up. I am not satisfied that more importance does not attach to this entry than the appellant was willing to admit, as the entry, if it did not of itself furnish the means of immediate access to the judgment, might at all events furnish the means of inquiry respecting it; but I think it sufficient to say that, whether important or unimportant, it is one of the things prescribed by the legislature as a * 754 condition of the judgment being binding upon * purchasers, and I do not think that the Courts can be warranted in dispensing with it.

Then as to the second point, it is clear, both from the evidence before us and from the cases which were referred to in the argument, that the docketing the issue is altogether a distinct matter from the docketing the judgment. There may, as I understand

the case, be a docket of the issue, where there is no judgment, or the issue may be docketed of a different term from the judgment; but what I understand this statute to have meant is, that there should be a docket of the judgment complete in itself with all the particulars which are specified in the statute, not that there should be merely such a docket as by reference to other entries or other sources of information might be made complete, and I think, therefore, the absence of the number roll is fatal to the appellant's case. It was said on the part of the appellant, that any prudent purchaser or mortgagee would of course have searched for the docket of the issue, and the witness who was examined before us stated that he should have done so if he had been instructed to make the search. But we are here on a question of statutory validity or invalidity, not on a question of notice, and with every disposition to defeat an objection which has so much of the character of technicality, I cannot go the length of holding, that what is invalidated by the statute, as I construe it, can upon such a ground be upheld. To decide the case in favour of the appellants upon that ground would be to give effect to the conduct of parties in opposition to the provisions of the statute, and to do so in favour of parties who have neglected to see those provisions complied with.

It was further argued on the part of the appellants, that the respondents were not purchasers within the * meaning * 755 of the statute, and that by the terms of their deed they took subject to judgments; but upon the point of the respondents being purchasers, entitled to the benefit of the statute, I have felt no doubt, and I do not think that the circumstance of the conveyance to the respondents having been made subject to judgments can give validity to this judgment or estop the respondents from disputing it. In my opinion, therefore, this appeal must be dismissed. I may add, that in so deciding, I think we are carrying out the principle on which the Courts of Law proceeded in the cases which were cited in the argument, although those cases do not reach so far as the present. The point, however, was one of novelty and importance, and I think, therefore, the appeal should be dismissed without costs.

THE LORD JUSTICE KNIGHT BRUCE. — I acknowledge myself not satisfied that the requisites of the statute have not been complied

with here. But my learned brother and the Vice-Chancellor KIN-
DERSLEY, whose united opinion is, I need not say, very likely to be
right, having arrived at a conclusion against the appellants, their
appeal must fail. I agree that being dismissed, it should be so
without costs.

1857. March 4. Before the LORDS JUSTICES.

A father by will gave his daughter an annuity, and also, in case she did not marry before the age of twenty-eight, a legacy of 1000*l*. By a codicil on the same paper, he gave her "furthermore" 5000*l*. "upon the terms hereinbefore mentioned." A suitor of the daughter wrote to the testator after the date of his will, and before she attained twenty-eight, proposing to marry her, in answer to which the testator stated what provision he meant to make for her in his lifetime, but did not mention the above intended testamentary dispositions. He added, that the marriage had his qualified consent, but that he must hear from his daughter before he made it absolute. The daughter wrote to the testator expressing her consent, to which, being very ill, he replied that he could not appoint a time to attend to business. He shortly afterwards died without making any further communication on the subject, and subsequently the marriage took place before the daughter attained twenty-eight: *Held*, —

1. That the 5000*l*. was subject to the same condition as the 1000*l*.
2. Per Lord Justice TURNER, that the testator had not given an unconditional consent to the marriage.
3. Per Lord Justice KNIGHT BRUCE, that even if the consent to the marriage ought to be considered as having become absolute, the daughter was not entitled to the 1000*l*. or 5000*l*.

THIS was an appeal from the decision of the Master of the Rolls, holding that a condition annexed to a legacy had been dispensed with by the testator in his lifetime.

The testator John Henry Furse made his will, dated the 9th of March, 1848, the material part of which was as follows: —

"I give and bequeath to my daughter Mary Wren the sum of 50*l*. a year during her natural life, the first payment to commence at the first quarter after my decease, for her own separate use, and not to be under the control of any one she may marry. And, providing that the said Mary Wren does not marry before she arrives

at the age of twenty-eight years, I also give to her for her separate use, and not to be under the control of any one she may marry, the sum of 1000*l.* absolutely, without power of anticipating the income, but with power to dispose of the capital by will."

On the same sheet of paper the testator wrote and executed a codicil in the following terms:—

"I give and bequeath furthermore to the said Mary * Wren the sum of 5000*l.* upon the terms hereinbefore * 757 mentioned. I give also to my wife Anna Sophia Furse the sum of 100*l.*, and I declare that the provision hereby made for my said wife shall be in lieu of and full satisfaction of all dower, thirds, &c., my said wife might otherwise claim or be entitled to out of my real estate. I declare this to be a codicil to my will, made this 18th day of January, 1854."

At the date of the codicil the testator's daughter Mary Wren Furse was a minor of the age of eighteen. In July, 1854, the Rev. H. D. Pearson wrote to the testator, asking his consent to a marriage with his daughter. The testator, on the 26th of July, wrote in reply: "My daughter is very young to embark on the cares of a married life, but I will not make any grave objection on that score; for I believe, as far as I can impartially observe, that her common sense is much in advance of her years. The ways and means seem rather scanty in these artificial days. I shall give my daughter from the time of her marriage the interest of 5000*l.* stock at 3*l.* per cent. If I read your letter aright, you are to have 300*l.* a year at your father's decease. According to circumstances, I may be able to add something more hereafter, but what I have stated is all I undertake. You have, therefore, my qualified consent; but I must hear of course from my daughter before I can make that absolute." On the 28th, Miss Furse wrote to the testator, stating her consent, and he wrote back to say that he was very ill and could not appoint a time to attend to business, and on the following day he died.

In May, 1855, Miss Furse was married to Mr. Pearson, with the approbation of the Court in this suit, which was a suit for the administration of the testator's estate, and the question now was, whether she was entitled to * the legacies of 1000*l.* and * 758

5000*l.* or either of them. The Master of the Rolls decided that the condition as to marriage had been waived, and that she was entitled to both legacies; and from this decision the residuary legatees appealed.

Mr. Roundell Palmer (with whom was *Mr. Surrage*) opened the case for the appellants and cited *Maunsell v. White*. (a) He was then stopped by the Court.

Mr. Lloyd and *Mr. E. F. Smith*, for *Mr. and Mrs. Pearson*. — The condition is illegal and void as being in restraint of marriage, no circumstances being alleged to show the propriety of any such restriction: *Hartley v. Rice*; (b) and the condition being subsequent, *Vin. Ab. Condition*, (c) the gift is absolute.

[THE LORD JUSTICE KNIGHT BRUCE. — May not the testator have thought that if she remained unmarried till twenty-eight, she would stand more in need of a fortune?]

A woman who does not marry at all needs a fortune most, yet our law does not allow a testator to make her fortune depend upon that. There is no gift over, and the prohibition of marriage is only *in terrorem*, and is effectual. *Roper Leg.* (d) Supposing the condition is legal and effectual, we say the testator by his consent to the marriage in his lifetime dispensed with it. *Brown v. Peck*, (e) *Wren v. Bradley*, (g) *Parnell v. Lyon* (h) [*Mr. R. Palmer* referred to *Webb v. Grace* (i) and *Bullock v. Ben-*

* 759 *nett* (k)], * *Smith v. Cowdery*, (l) *Wheeler v. Walker*, (m)

Gath v. Burton. (n) The words, “upon the same terms” in the gift of the legacy of 5000*l.*, are not annexed to the words of gift, as the words in restraint of marriage are in the gift of the 1000*l.*, and it is therefore to be held that the 5000*l.* was only given upon the same limitations as the former legacy, but not upon the same conditions.

(a) 1 Jo. & Lat. 539.

(b) 10 East, 22.

(c) Z. d. 41.

(d) Pages 795, 832 (4th ed.).

(e) 1 Ed. 140.

(g) 2 De G. & Sm. 49.

(h) 1 V. & B. 479.

(i) 2 Phill. 701.

(k) 7 De G., M. & G. 283.

(l) 2 S. & S. 358.

(m) 1 S. & S. 304.

(n) 1 Beav. 478.

Mr. H. Stevens, for the trustees of Mrs. Pearson's settlement.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me that the two legacies of 1000*l.* and 5000*l.* are given in the same manner and on the same terms and conditions in all respects. If the condition on which the present contention arises was precedent, I think that it was valid, and that its performance has become impossible, and that, therefore, the gift cannot take effect. If it was subsequent, it was, in my opinion, reasonable and valid; it has not been testamentarily waived, and, supposing it capable of being otherwise waived, it has not, in my judgment, been so waived. In saying this I assume the testator's consent to the marriage to have been absolute; for, in my view, its being absolute is immaterial in such a case and under such testamentary dispositions as those before us.

THE LORD JUSTICE TURNER. — The legacy of 1000*l.* appears to me to be given in opposition to the previous gift of the annuity, the one being given absolutely for life, the other given upon a condition. Then, as to the legacy of 5000*l.*, I think *that it was bequeathed not merely on the same limita- *760 tions as the former legacy, but subject also to the same condition. This condition has not been complied with, and as to the consent of the testator to the marriage, I do not think that he ever gave any unconditional consent. I am of opinion, therefore, that neither legacy is payable.

STOURTON v. STOURTON.

1857. February 25, 28. March 17. Before the LORDS JUSTICES.

A Roman Catholic left a widow, also a Roman Catholic, and a posthumous child. The widow, some time after her husband's death, became a member of the Church of England, and without any interference on the part of the child's other relatives, who were all Roman Catholics, brought him up as a member of the Church of England, until he was upwards of nine years old; and it appeared, in an interview with him, that the distinctive doctrines of

that church had taken a strong hold on his mind: *Held*, that it was too late for the Court to give directions that he should be educated in the faith of his father.

THIS was an appeal from an order of the Master of the Rolls appointing the mother of the infant plaintiff his sole guardian, the substantial question in dispute being, whether he was to be brought up as a Roman Catholic.

The infant plaintiff was the only and posthumous child of the Hon. John Stourton, a Roman Catholic, who had, in May, 1846, married Caroline Emma MacNolty, a Roman Catholic lady. Mr. Stourton died intestate on the 28d of May, 1847, and the infant plaintiff was born a week afterwards. He was baptized as a member of the Roman Catholic Church, his uncle Lord Stourton and Lady Stourton (both members of that church) being his godfather and godmother.

Mrs. Stourton, after her husband's death, and as it appeared from the evidence, not later than the year 1852, became a member of the Church of England. The infant plaintiff, up to the time of the present appeal, remained in her sole charge. He was sent, in

May, 1853, to a preparatory school. About the end of 1853,

* 761 * Mrs. Stourton took him to Paris, and in April, 1854,

brought him back to England. In September, 1854, she took him again to Paris, and he there went to school as a day-boarder till April, 1855. He was then placed with the British chaplain at Heidelberg, and in the early part of 1856 was sent to reside with a clergyman of the Church of England at Brighton, where he had ever since remained. His education throughout had been Protestant from May, 1853, and had, during the periods in which he did not attend any school, been conducted by governesses chosen by the mother. The plaintiff's income was very small, and he had been maintained and educated at the expense of his mother, who had an independent fortune.

In October, 1856, the present bill was filed, in the name of the infant, by Lord Stourton as his next friend, against the mother, for the purpose of making him a ward of Court, and in the following month a summons was taken out for the appointment of a guardian, and directions as to the maintenance and education of the plaintiff.

Lord Stourton by affidavit stated, and it was undisputed, that all

the plaintiff's near relations except his mother were Roman Catholics; that the deponent and the other near relations wished that he should be brought up a Roman Catholic, and that the deponent or some other member of the family should be appointed his guardian, either alone or jointly with the mother. His Lordship proposed St. Mary's School, near Chesterfield, as the place for the plaintiff's education, and went on to say: "If the defendant should refuse, out of her income, to contribute funds for the maintenance and education of the plaintiff, I am willing, if appointed his guardian, to undertake to maintain the plaintiff, and * educate him in the Roman Catholic faith, without any * 762 assistance except from the plaintiff's income for the time being."

Mrs. Stourton by affidavit stated how the plaintiff had hitherto been educated in the faith of the Church of England, and that she professed that faith and wished him to continue to be brought up as a member of the Church of England; that she was willing to continue to maintain and educate him while she acted as his guardian, and that she objected to the appointment of any other person as guardian, either alone or jointly with her. She deposed that the plaintiff was a boy of delicate health, and that St. Mary's School was a branch of the Jesuit College at Stoneyhurst, and was not, in her opinion, a proper place of education for him.

The Master of the Rolls, after taking time to consider, made on the 19th of November, 1856, the following order: "It is ordered that the Hon. Caroline Emma Stourton be appointed the guardian of the person of the plaintiff John Stourton, an infant, during his minority or until the further order of this Court."

The notice of appeal motion dated the 17th of February, 1857, was as follows: "That the order made in this cause by his Honor the Master of the Rolls, dated the 19th day of November, 1856, may be discharged or may be varied as the Court shall think fit, and that the above-named Charles Baron Stourton or some other fit and proper person or persons may be appointed to be the guardian or guardians of the plaintiff during his minority, solely, or jointly with the defendant, the Hon. Caroline Emma Stourton, and that directions may be given respecting the maintenance and education of the said plaintiff, and particularly for his education in the Catholic faith."

*768 *Lord Stourton by affidavit in support of the appeal deposed that Mrs. Stourton and the plaintiff had visited him at his residence in February, 1850, January, 1851, and August, 1852, and that during those visits they had attended service in the Roman Catholic chapel attached to his residence, that Mrs. Stourton did not then profess the faith of the Church of England, nor was then educating the plaintiff in it, and that since August, 1852, she had only visited Lord Stourton once, and then only for a few hours. Mrs. Stourton in opposition deposed as follows: "I admit that whilst staying with Lord Stourton in the years 1850, 1851, and 1852, as set forth in his affidavit sworn in this cause on the 14th day of January last, I did attend the prayers and services in the chapel which is attached to his residence, but I did not during my said visits in 1852, and according to the best of my belief in 1851, communicate according to the rites of the Roman Catholic Church, because I did not then nor do I now believe in the Roman Catholic doctrine of transubstantiation, and Lord Stourton and the priest who officiated in the chapel were aware that I did not communicate and of my reason for not doing so. I have not at any time instructed nor have I suffered any other person to instruct the plaintiff in the Roman Catholic faith, but on the contrary I have educated him from his earliest years strictly in the faith of the Church of England, and I have the strongest objection to his being educated in the faith of the Roman Catholic Church."

Mr. Bagshawe and *Mr. W. H. G. Bagshawe*, for the appeal motion. — That an infant should be brought up in the religion of his father is a matter of course. If the plaintiff had been of more advanced age there might have been objections to changing the course of his religious education, but there cannot be any
 *764 danger of unsettling the religious *convictions of a boy not yet ten years old, for he cannot at that early age have acquired any fixed religious principles. [*Witty v. Marshall*, (a) *Re North*, (b) *Talbot v. Earl of Shrewsbury*, (c) *Re Hunt*, (d) *Bligh v. Bligh*, (e) and *In re Race*, (g) were referred to.]

(a) 1 Y. & C. C. C. 69.

(d) 2 Connor & Lawson, 52.

(b) 11 Jur. 7.

(e) Set. Dec. 353 (2d ed.).

(c) 4 M. & C. 673.

(g) V. C. K. 1857. Not reported; see 26 L. J. N. S., Q. B. 169 and 176, n.

Mr. Roundell Palmer and Mr. Giffard, for Mrs. Stourton.— It is very objectionable that after the relations have acquiesced for so long a period in the education of the plaintiff as a member of the Church of England, they should now attempt to alter his course of religious bringing up. If the experiment of educating him as a Roman Catholic is now tried, the result will in all probability be to estrange him from his mother and to leave him with no religious principles at all. *Witty v. Marshall, (a) Lyons v. Blenkin. (b)*

Mr. Bagshawe, in reply.

Their Lordships at the close of the argument said that they thought it proper to have a private interview with the infant. The plaintiff accordingly attended their Lordships on the 28th of February.

Judgment reserved.

March 17.

THE LORD JUSTICE KNIGHT BRUCE.— The main, if not the single question in this case is, whether the plaintiff, an infant, shall be hereafter educated as a Roman Catholic or as a member of the * Anglican Church. By the order under * 765 appeal, the Master of the Rolls has in effect decided for the latter alternative, but does not appear to have seen the plaintiff, who, a boy of delicate constitution, born late in the month of May, 1847, is the posthumous son and the sole issue of Mr. John Stourton, a Roman Catholic gentleman, one of the younger children of the late Lord Stourton, who died, I think, in or before that year; and, there not being any proof that Mr. John Stourton meant or wished his son to be educated otherwise than as a Roman Catholic, it may, I suppose, be taken as clear that he ought to have been taught and brought up as a member of that church, independently of the circumstance that his mother, the defendant, until her husband's death, and probably for sometime afterwards, was or professed to be a Papist also. It appears, however, that she is now and has for some, I believe more than four if not more than five,

(a) 1 Y. & C. C. C. 69.

(b) Jac. 245.

years been a member of the Church of England, and the plaintiff having ever since his birth been under her care and control, she has uniformly hitherto instructed and educated, and is now educating, him as an Anglican Protestant. That (the religious opinions of her husband and of the Stourton family considered) she should have thought herself justified in taking such a course is perhaps surprising. But that until the autumn of last year the paternal relatives (all I believe Roman Catholics) should have allowed this, and that the order of Sir JOHN ROMILLY made on the 19th of November last, if unsatisfactory to them, should not until the latter part of February have been made a subject of appeal, seem to be circumstances even more remarkable, for there can be little or no room to doubt that the boy might and would have been brought up as a Roman Catholic, had they not omitted to interfere on the subject, and not left Mrs. Stourton to take freely her own course in this important respect, as until October, 1856, * 766 * they did. Nor hitherto has his Protestant instruction been interrupted. I say "omitted" and "left," because not any deceit or concealment is established against Mrs. Stourton; none indeed ought, perhaps, to be considered as alleged. I observe, too, that in the last of the affidavits the lady says: [His Lordship here read the passage which is set out above from Mrs. Stourton's last affidavit.] I see no reason for disbelieving this statement.

The bill in the cause, for the purpose, I suppose, mainly of obtaining guardians or a guardian for the plaintiff, was filed by his uncle, the present Lord Stourton, as his next friend, not as I have said before the latter part of the year 1856. His Lordship had then, I think, been the head of the family for nine years and more. The order under appeal was thus: [His Lordship read the order appealed from.]

In making this order, though silent as to maintenance equally and education, the learned Judge must, I think, have intended that the boy should be educated as a Protestant at the charges of his mother and maintained by her. He has a fortune in expectancy, but very little or substantially nothing, I believe, in possession. She has a sufficient income, and was and is, as I understand, very willing to continue to bear the whole charges of his maintenance and education during her guardianship. I may, in passing, add here, that Lord Stourton, in an affidavit that was before

the Master of the Rolls, said: [His Lordship here read the passage, which is set out above, containing Lord Stourton's offer as to the expense of the maintenance and education of the plaintiff.]

The notice of appeal under which the competitors for the infant's spiritual direction are here, a notice proceeding * from Lord Stourton, was thus: [His Lordship read the * 767 notice given above.]

In my judgment, I repeat, there has been a failure in duty to the late Mr. Stourton. Application might of course have been made to this Court as to the child before his mind had become religiously influenced and biassed; in which case I am persuaded that his education in the doctrines of the church of his father would have been ordered and, so far as possible, secured. Ought the same thing to be or can it be done now? At the close of the argument, I was unable to consider it otherwise than very possible that, notwithstanding the early age of this boy, his mother, a convert, might so effectually have availed herself of the full opportunity afforded by the paternal relatives as to have made religious impressions on his mind to a depth and an extent rendering dangerous and improper any attempt at important changes in them. It was my opinion accordingly, and that also of my learned brother, that we should have an interview with the lad. He was brought to us in consequence on the 28th of February, and conversed with us. Certainly I had thought it not unlikely that we should find him in collegiate phrase "crammed" for the occasion; but I cannot say that I had anticipated such answers as he gave to some questions that we asked him, or was prepared for some of the observations that he made; not exhibiting (to us at least) any marked idiosyncrasy, he seemed to be in point of intelligence rather above than below mediocrity, and to have received (what, indeed, in the circumstances, was to be expected) more minute and close instruction as a Protestant upon some at least of the main points of difference between the Church of England and that of Rome, than is usual in England with boys of his age. He spoke on the subjects of transubstantiation, the attributes of the Virgin * Mary, the invocation of saints, and the authority of * 768 the Pope, in a manner convincing me that the Protestant seed sown in his mind has taken such hold, that if we are to suppose it to contain tares, they cannot be gathered up without great

danger of rooting up also the wheat with them. Upon much consideration, I am of opinion that the child's tranquillity and health, his temporal happiness, and, if that can exist apart from spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavour at effacing his Protestant impressions, not to render any such attempt unsafe and improper. That I regret his estrangement from the particular church of his father and his father's family, an estrangement to which they have so long been, seemingly at least, indifferent, I will not deny. The regret, however, is not without mitigation; one, nor the least, cause being the reflection that he will not be taught to consider his mother as having led her only child into the paths of error and as being herself a castaway. I have said that she stands at present appointed guardian, and as, subject to the religious difficulty, her conduct is unquestioned and seems to have been unobjectionable, the defect in the evidence of her fitness — a defect rather formal than substantial — needs not, I think, be insisted on, nor can I consent to displace her. But the lady will understand that her son is not again to be taken out of England without the leave of the Court,¹ and I take for granted that she will readily consent to undertake to provide in a suitable manner for his maintenance and education during her guardianship.

It remains to decide whether she should, for the present at least, remain, as she is, the sole guardian. No other has in effect been suggested, except Lord Stourton, who has expressed his willingness, though I do not say unconditionally, to be appointed * 769 either solely or jointly * with her. He proposed himself indeed, as I collect, though perhaps conditionally, before the Master of the Rolls — is the godfather of the boy, and, as I have said, the head of the family. That he would prefer and intend a Roman Catholic education was to be expected, but I have been, I own, surprised to find him purposing to commence the functions of the guardianship (if nominated to it) by placing his brother's son at a Jesuits' seminary or establishment, of which the prospectus (so I believe such announcements are now called) is among the evidence before us. Judging from that paper I confess that the school, though probably in point of economy, and very possibly on other grounds also, well recommendable for the sons

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1355 and notes.

of many worthy persons, and though I mean to speak of it without the least disrespect, appears to me singularly selected for a delicate boy in the tenth year of his age, well connected, having high-placed and wealthy relatives, and bearing a name of such distinction as rank and antiquity can give, nor will I affect to feel any sorrow that we shall not be the means of sending him thither. This I say apart from any question of moral teaching, a point of view in which the active, ingenious, penetrating, and persuasive fraternity that I have mentioned may not have had justice done to it by the Provincial Letters, or may, since that day, have undergone a change, but as to which I should require more exact information than I possess before committing the education of a ward, though a Roman Catholic, to a branch of the order; still, were that information obtained and satisfactory, I agree with Mrs. Stourton that though her son were a Roman Catholic and so to continue, the proposed place of education, however well conducted, however respectable, and however suitable for many persons, would not be a place for him.

There is at present no evidence of Lord Stourton's * fitness. That evidence, however, could, I am convinced, * 770 be without difficulty supplied. I assume it to be before us, nor have I any doubt of the goodness of his intentions. But I think nevertheless, from the circumstances which I have stated, that he had better not be — nor indeed, perhaps, the boy remaining a Protestant, would his Lordship wish to be — associated in the guardianship.

Dismissing therefore the appeal, and with it the religious question, I will only add that it has been gratifying to me to perceive no neglect, no illiberality, on the part of Mrs. Stourton, no inappropriateness to the station or claims of an English gentleman in the course hitherto pursued by her, whether as the natural or the appointed guardian of her son, and I join with confidence in committing him to her charge.

THE LORD JUSTICE TURNER. — This is a motion to discharge an order of the Master of the Rolls appointing the defendant Mrs. Stourton, the mother of the infant plaintiff, to be his sole guardian. The father of the infant plaintiff died in the month of May, 1847, intestate. He was a member of the Roman Catholic Church, and all his family have been and continue* to be members of the

same church. The defendant Mrs. Stourton, the mother of the infant plaintiff, was also at the time of her marriage, and during the life of her husband she continued to be, a Roman Catholic; but after the death of her husband, and, as I collect from the affidavits, at some period not later than the year 1852, she became, and she has ever since continued to be, a member of the Church of England. The infant plaintiff is a posthumous child and an only child. He was born about a week after his father's *771 death, and on * the 30th of May, 1847. He was baptized in the Roman Catholic Church, and his paternal uncle, Lord Stourton, a Roman Catholic, and the wife of Lord Stourton, also a Roman Catholic, were his godfather and godmother. From the period of his birth, he has been under the care of his mother, receiving his education from her, from governesses employed by her, and at schools at which she has placed him, and he has hitherto been wholly brought up as a Protestant. The only ground of objection to the appointment of Mrs. Stourton, the mother, to be the sole guardian of the infant appears to be that she is bringing up the child in the faith of the Church of England, Lord and Lady Stourton not unnaturally desiring that he should be brought up as a member of the Roman Catholic Church, of which, as I have already mentioned, his father was a member and his father's family continue to be members.

The principles by which this Court is governed in cases of this nature, where there are no testamentary guardians, are not, as I apprehend, open to any serious doubt. When infants become wards of the Court, the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious-distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard, as I apprehend, to the power with which the law of the country has intrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to. Where, therefore, as in the *772 present case, the father * has died without having expressed his intention as to the education of his children, and appli-

cation is immediately or promptly made to this Court for its interference, I take it to be very much of course that the children should be brought up in the faith which the father has professed, the Court presuming that such would be the wish of the father; but where, as in the present case also, the application to this Court has been delayed, and the children have been suffered to receive religious impressions different from those which the father entertained, other and far more serious considerations present themselves; the wishes of the father may be in conflict with the well-being and even with the safety of the children; and, in order to ascertain whether this is the case or not, it becomes necessary to see what is the extent of the impression which has been made upon the minds of the children, and to consider what may be the danger of disturbing that impression. It was with this view, and not, as was suggested at the Bar, with a view to being guided by any wish which the child might express, we deemed it right to see the infant plaintiff in this case before determining the question before us; and notwithstanding what was said at the Bar upon the subject, I am perfectly satisfied that the course which we took in this respect was correct. I think it the duty of the Court, in cases of this description, to pursue that course. That the minds of children are capable at a very early age of receiving strong impressions upon matters of religion, as well as upon other matters, is not to be denied; and having seen the infant plaintiff in this case, and considered what passed at our interview with him, I am satisfied that his mind has received impressions, and strong impressions too, upon religious subjects, which are at variance with the faith which his father professed. I have felt bound to consider, therefore, what might be the result of disturbing those impressions. It was urged * at * 773 the Bar, that the opinions of a child so young could not be fixed, and that the impressions which this child has received, might be removed by a different course of instruction and different associations. It might be so; but, on the other hand, may it not be that the impressions which have been formed might lead to the instruction which would be given being received with carelessness or indifference, or, which would certainly not be less dangerous or less destructive to the character of this boy, with affected acquiescence? May it not be that the attempt to force upon this child a different faith might end in unsettling his existing impressions,

and substituting no fixed impressions in their place? I much fear that it would be so. I think it the more probable from the unhappy differences of opinion upon religious subjects between the mother (on whom the boy would naturally lean) and the father's family, who would as naturally endeavour to plant in the mind of the child opinions different from those which the mother entertains; but whether the consequences would or would not be such as I have pointed out, the danger of Mrs. Stourton's being removed from the guardianship being followed by such consequences is one to which I dare not venture to expose this child. I should have been better satisfied that some gentleman of the same faith as the mother had been associated with her in the guardianship, and I hope that when the child attains a more advanced age this will be attended to; but in the mean time I think that the order of the Master of the Rolls is right, and that this motion must therefore be refused.

1857. February 11, 12. March 17. Before the LORDS JUSTICES.

In the absence of special circumstances, a Court of Equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser. And where the circumstances of such a case did not appear to the Court sufficient to constitute a waiver of the objection, a bill for specific performance was dismissed with a fixed amount of costs.¹

THIS was an appeal by the defendant, a purchaser from a decree for specific performance.

The subject-matter of the suit was a piece of arable land, containing 1a. 14p. forming a portion of the common or open fields at Ham. On the 11th of July, 1855, the plaintiff Miss Denne, the owner of the land, entered into an agreement by private contract to sell it to Mr. Light, who acted on behalf of a Mr. Hatch, a

¹ See Sugden *V. & P.* (14th Eng. ed.) 24, n. 330; 1 Dart *V. & P.* (4th Eng. ed.) 105, 946; Fry *Spec. Perf.* (2d Am. ed.) 189.

farmer at Ham, who was the real purchaser. The contract, which was a formal document prepared by a professional man, was entirely silent as to any right of way to the land, which was surrounded on all sides by lands of other proprietors. An abstract was delivered, and the title was accepted subject to a requisition that the vendor must show a right of cart or carriage way to the piece of land. There was no visible road marked out to the land, but it had been cultivated without interruption or disturbance. It had for a long time been occupied together with adjoining lands, and it had consequently not been of any importance whether the land possessed an independent access or not. It appeared not improbable that owing to this circumstance some right of cartway which had formerly appertained to the land had been lost by disuse. The principal witnesses were Mr. Nightingale, the agent of the vendor, and Mr. Hatch, the substantial though not the nominal defendant, both of whom, after having given evidence in the ordinary way, were examined orally before their Lordships.

* Mr. Nightingale deposed to the effect, that before the * 775 contract he had several interviews with Hatch about the land; that Hatch had said there was no right of way to it; that he (Nightingale) had replied that his impression was, that there could not be any land in the common field without a right of way to it; that Hatch had asked him whether he would point out the way; that he had replied, that he would not be bound to do so, nor would his employer; that he told Hatch, he had sold the crop in the preceding year, and met with no obstruction; that the subject was mentioned when the bargain was struck; that he had then told Hatch, that the vendor would not be bound to point out a right of way, and that if Hatch bought he must take the land as it was, with such rights and liabilities as the vendor had or was subject to. He admitted that he had sold the crop of 1854 to a person of the name of Lindsay, and had some conversation with him as to there being an objection to a right of way to get off the crop.

Mr. Hatch, on the other hand, stated in his evidence, that before the contract he had asked Nightingale whether there was a right of way to the land; that Nightingale had replied, that of course there was, as it was common field land, and no one could dispute there being a right of way to common field land; that he, Hatch, had said, "Suppose the right was disputed," to which Nightingale had replied, "No one can dispute it;" that in July, 1855, after

the contract, he went to examine the land, and could not trace any way to it. He admitted that he had known the land for some period before the contract.

The vendor being unable to furnish the required evidence, * 776 the present bill was filed, and Vice-Chancellor * STUART made a decree for specific performance. The defendant appealed.

Mr. Malins and *Mr. W. D. Lewis*, for the plaintiff, in support of the decree.

Mr. Bacon and *Mr. G. W. Collins*, for the defendant, contended, that the vendor was bound to prove a right of way. And as to the position in which the purchaser would be if he completed his contract without such evidence, they referred to *Sury v. Pigot*, (a) *Houton v. Frearson*, (b) *Bullard v. Harrison*, (c) *Cru. Dig.* (d) *Pomfret v. Ricroft*, (e) *Clark v. Cogge*. (g)

Mr. W. D. Lewis, in reply.

Judgment reserved.

March 17.

THE LORD JUSTICE KNIGHT BRUCE. — The plaintiff in this cause is a young lady of Kent, who, having, by gift or otherwise, acquired the ownership of the estate in question, and so become territorially connected with Surrey, was advised, probably by her father, to free herself from it by a sale; and, the step having been resolved on, a corps of assistants, chosen from the professions usually invoked upon such matters, was set in motion, — selected, as to the solicitors, from Kent (they, of course, employing London lawyers) * 777 and * as to the land agent, from Surrey, where (living at Kingston, a town near the estate) he promulgated the design, and soon a chapman appeared in the person of Mr. Wm. Hatch, the real, though not nominal, defendant here. He deals; and in the summer of 1855 (after some ineffectual struggles to

(a) *Tudor's Cases on Real Property*, 127 (2d ed.).

(b) 8 T. R. 50.

(e) 1 Wms. Saund. 323, n. (6).

(c) 4 M. & S. 387.

(g) *Cro. Jac.* 170.

(d) Vol. III. title 24.

obtain easier terms) brings himself to offer as much as 100*l.*; an offer, unluckily for him — unluckily for the plaintiff — accepted; whereupon the purchaser, calling in a solicitor at Kingston to encounter the Kentish solicitors of the seller, there followed the costly ceremonial attendant — I will not say generally, let me rather say not very unusually — upon English purchases of land: a contract formally prepared and signed, then an abstract of title transmitted and perused, then objections, queries and requisitions, answers and replies, correspondence, embroilment, and a suit in chancery. Before, however, the *ultima ratio* had been appealed to, — before the last extremity, — the differences of the representatives of the contracting parties had worn themselves to a point which I will now mention.

The land in debate, having a superficies of one acre and fourteen perches, consisting of arable ground lying in a ring fence (on one side visible, on the others invisible), and forming a portion of the common or open fields of Ham, is, to use a French word, *enclavé* in the lands of strangers, and it was, on Mr. Hatch's part, alleged to be doubtful at least whether there was any road or way by which, without permission from some conterminous proprietor (by "permission" of course being meant a license that might at pleasure be granted or revoked or withheld), the land or any part of it could at any time of the year be entered or reached for agricultural or any other purposes. Mr. Hatch and his solicitor accordingly required proof of the existence of some * such road * 778 or way. The proof, if not impossible, was at least refused to be given, and — the purchaser still insisting on the demand — Mr. Light, whose name was used for him in the contract, was summoned, on the part of the vendor, hither to meet the present bill.

Such, then, is the controversy before us, the first question being, whether, if there was reason to doubt as to the matter of fact, the purchaser was justified in the requisition; and, without giving any opinion upon the point as a mere point of law, I think that this Court, in a suit against him for specific performance as this is, ought to hold in the affirmative, that is to say, make the supply of the required proof a condition of giving the plaintiff a decree. In the case of a contract silent like the present on the subject, to induce a Court of Equity to exercise its power of compelling the completion of a purchase of land when it is reasonably uncertain whether any means of entering on the land at all times will or can

be conferred on the purchaser, there ought, as I conceive, to be conduct on his part or circumstances beyond any which the present instance furnishes. Not that, so far as I know, there has been any such decision specifically, but that such is the view which I take of the principles guiding the equitable judicature of the country in decreeing specific performance of agreements or leaving them to be enforced, so far if at all as they can be, at law. Here I think, — unless, through the purchaser's conduct or collateral circumstances, the hardship has been rendered none or immaterial, — there is enough of substantial hardship in the case to neutralize the Court, unless on the terms of giving the proof demanded, even if the strict rule of law is in the vendor's favour, as to which, I repeat, * 779 that I mean to say nothing; nor do I forget, when * using the expression "substantial hardship," how small the purchase in dispute is, and that, probably, the purchaser would have acted more wisely had he submitted rather than resisted in a quarrel almost *de land caprind*. But, in my judgment, the Court must not be influenced by that consideration to grant specific performance in a case not otherwise proper for it, nor for such a purpose regard the hardship as light and unsubstantial. The price cannot, I think, affect this particular point.

Is there, then, upon the evidence before us reason to doubt as to the fact? I am of opinion that there is. However the matter may have come to pass (if it has come to pass), whether through encroachment upon one side and negligence or submission upon the other, or by whatsoever means (though the evidence of Mr. Davies enables one to make a probable conjecture what the means were), it seems to me possible, nor very improbable, that the owner for the time being of the litigious territory has in effect lost the right with a plough or cart or carriage at any time, and otherwise during certain seasons at least of the year, to pass to it over any part of those lands of other persons by which it is entirely surrounded. She may have such a right. It may still be enforceable. But I repeat that this as yet is not, I think, proved and appears to me doubtful.

For the plaintiff, however, it is insisted, that if not exempted and protected by the silence of the contract (which it is contended for her that she is) exemption and protection have been given to her by the notice and knowledge which on her part are imputed to Mr. Hatch of the true state and condition of the property in this

respect when and before the contract was made, and by what passed in conversation between him and the land *agent, * 780 Mr. Nightingale, during the negotiation which ended in the agreement. With regard to the silence of the contract, that certainly is remarkable when we consider what Mr. Hatch and Mr. Nightingale respectively depose, whichever of them is the more accurate witness. How, in the circumstances, a contract, not dealing expressly in any manner with the subject of a road or way limited or unlimited, or the absence of a road or way, to the land, could have been approved on behalf and allowed to be signed by each of the parties, I find it impossible to conjecture. The fact, however, though all but incredible, is undeniable. But as I have said it does not seem to me of importance for any purpose of the present suit. With regard to the external appearance of the acre and fourteen perches, and the lands around them, it may reasonably, I think, be inferred from the evidence, that Mr. Hatch, a neighbouring sportsman and farmer, when and long before he commenced the negotiation, was well acquainted with it; and there seems reason to believe, that not upon any portion of the acre and fourteen perches or of the surrounding lands was there a formed road, or even any trace or mark of a way. But this I do not consider material, especially as it seems clear, that whether by permission or sufferance or of right, men and carts had been in the habit of passing over some part of the surrounding lands to the acre and fourteen perches for purposes of cultivation and carrying away the crop. I may add, that I was on the spot in the course of last week, and saw no trace of a way, but found the land under the plough, very recently ploughed, seemingly about to be sown, and apparently occupied and used with adjoining land, as if they formed together one field in one holding. I saw nothing, however, except what I expected to see, and should have believed without personal observation. [His Lordship here stated * the material parts of the evidence of Mr. Nightingale and * 781 Mr. Hatch, and proceeded as follows:]

I need scarcely say, that if Mr. Hatch's recollection is accurate, he is right in the contention upon which I now am. But the contrary, I think, does not follow if Mr. Nightingale's memory is correct. Assuming that correctness, and assuming his evidence to be admissible against the defendant for every purpose for which it has been tendered and used, still I cannot but observe, that Mr.

Nightingale did not say to Mr. Hatch, that there was not a perpetual right of way to the land ; Mr. Nightingale, on the contrary (who before the contest may not have known as much as Mr. Davies, or the effect of a stoppage of twenty years and more upon a right of way), seems to have believed and yet to believe that there was in 1855, and still is, a perpetual right of way to it. He says that he declined pointing out the *iter*, and declared that neither he nor his principal would undertake to do so, or to that effect. But the question I apprehend to be, whether by any course or line there is any perpetual right of way to the land. It was well argued for the plaintiff, that to refuse to undertake the description or designation of any line or course was, in effect, for all present purposes, the same as refusing to undertake for there being any right of way ; a proposition, however, to which I am unable to accede, especially in a suit for specific performance, where the vendor is plaintiff, and the contract, a written contract, is silent on the subject, a silence much to be regretted. Perhaps, however, had either side required that silence to be departed from, there would have been no contract.

The suit is frivolous. How the plaintiff, if Miss Denne is really as well as nominally the plaintiff, could have been recommended to sue — how, I had almost * said, as her father is living, it could have happened that she was not prevented from suing — in respect of such an amount of purchase-money upon such a case, is scarcely conceivable ; nor, perhaps, is it much less surprising that the real purchaser, Mr. Hatch, by residence almost a Londoner, but being also a farmer of mature age, living in the immediate neighbourhood of the land, and apparently a man not uneducated nor without intelligence, should not, in preference to encountering an uncertain chancery suit (a suit in which he has once been, and may finally in the House of Lords be, defeated with costs — and in which, if it could have been reasonable to anticipate with confidence a dismissal of the bill with costs, he must probably have been aware that the whole of his charges would not be thrown on his adversary) should not, I say, have rather elected to pay 100*l.*, to take to the land, and make the best of it.

Hither, however, the hapless antagonists have been brought, and regrets are vain. Those who conduct the cause for the plaintiff, if still for war, may take an inquiry as to a right of way

throughout the year to the land, which if they shall elect not to do, the bill must, I conceive, be dismissed — dismissed with costs, as one of us — without costs, as the other, was inclined to think. Having, however, considered that point together, we have come to the conclusion that the bill, if dismissed, shall be so with 40*l*. costs, given, so far as I am concerned, to the defendant, by reason alone of the evidence into which the plaintiff has entered. So, therefore, in effect, while Miss Denne will have bought her own property at more, I suppose, than its value, Mr. Hatch will have paid probably at least half the amount of his purchase-money, with nothing, as the phrase is, to show for it ; and thus we have another reproduction of the apologue so great a favourite with the numerous * enemies of the race of lawyers, which, in one I * 783 think of the best versions, ends with —

“ Des sottises d'autrui nous vivons au palais :
Messieurs, l'huitre était bonne ; adieu, vivez en paix.”

THE LORD JUSTICE TURNER. — This is a suit by a vendor against a purchaser for specific performance. The Vice-Chancellor Sir JOHN STUART decreed specific performance with costs. The appeal before us is from that decree. [His Lordship read the description of the property sold as contained in the contract (which stated it to be freehold arable land, without any reference to the mode of access), and then proceeded as follows :]

It is situate in and part of the open or uninclosed common field called Ham Common Field. The objection on the part of the purchaser to the specific performance as taken by the answer is, that there is no cart-way or carriage-way to the land contracted to be sold. In fact, so far as appears, there is no access to it, the land being separated from the public road by an intervening strip belonging to another proprietor, and being surrounded on all the other sides by lands also belonging to other proprietors.¹ The vendor insists that this objection on the part of the purchaser cannot be maintained, on several grounds : first, because nothing is said in the contract on the subject of a right of way, and an agreement for the sale of land does not, as she insists, import that there is a cart-way or carriage-way to the land, to the absence of which she contends that the purchaser's objection is limited by

¹ Washb. Easements (2d ed.), 218 *et seq.*

the answer; secondly, because, as she alleges, the purchaser, at the date of the contract, was acquainted with the nature and circumstances of the holdings of land in these common fields, * 784 and the rights of the proprietors * of land therein with reference to the enjoyment of and obtaining access to their respective lands, and the questions and difficulties which might exist and be raised with respect thereto; and thirdly, because, as she also alleges, the purchaser, before entering into the contract, was told by her agent, that although his belief was that there could not be any land in an open common field without a right of way to it, the vendor would not define or point out any way or road, and that if he the purchaser purchased the land he must take it with such rights and liabilities as pertained to it, and such as the vendor possessed.

With respect to the first of the points thus insisted upon by the vendor, I do not think it material whether the purchaser's objection is or is not limited by the answer to the absence of a cart-way or carriage-way, for the land, in this case, is sold as arable land; and if the sale of the land at all imports a right of way, I think it must import such a right of way as is necessary to the enjoyment of the land, and a cart-way or carriage-way is clearly necessary to the enjoyment of arable land. I think, therefore, this part of the objection is unimportant; and as to the rest of this objection, I am of opinion that, setting aside the questions of previous knowledge and previous information, it would not, whatever may be the import of this agreement at law, be consistent with the principles of a Court of Equity, or with the decided cases, to enforce this contract against the purchaser without securing to him a cart-way or carriage-way to the land. To do so would be to compel the purchaser to pay for what he would not have the means of enjoying.

As to the second point on which the vendor has insisted, I think the evidence on the part of the vendor makes out no case * 785 which can avail against the purchaser. * I take the question which the purchaser had to consider to have been, whether there was a right of way to this particular land, not whether there were rights of way to all the lands in the open common field; but even assuming that it was the latter question which the purchaser had to consider, the evidence on the part of the vendor falls very far short of satisfying my mind that either the purchaser or his

agent had any sufficient knowledge upon the subject of the rights of way to the lands in the open common fields to affect or vary the purchaser's rights under the contract.

Then as to the third point on which the vendor relied, the evidence on the subject is very contradictory. It is positively asserted by the agent on the part of the vendor, and as positively denied by Mr. Hatch, who assumed to act as the agent of the purchaser, but was in fact himself the purchaser, that he, Mr. Hatch, was told that if he purchased the land he must take it with such rights and liabilities as the vendor possessed and was subject to. If the issue of the case depended upon this point, it would be difficult to decide it upon this evidence; but I think it may well be decided without reference to the contradiction upon this point. Assuming the statement on the part of the vendor's agent to be correct, we must, I think, look back to see what had previously passed on the subject of this right of way and under what circumstances the assumed agreement on the part of the purchaser to take the land with the vendor's rights and liabilities was made. I have, therefore, carefully examined the evidence on both sides in this point of view. Upon the result of that examination, I am satisfied that representations were made by the vendor's agent to the purchaser's agent for the purpose of inducing him to believe that there was an undoubted right of way to this land. I think that those

* representations were not warranted by the facts as they * 786 stood. I think they were the less warranted on this account, that upon the occasion of the sale of the crop to Lindsay in the year 1854 there was some mention made of the right of way, and the vendor's agent, his witness in this case, as he admitted in his examination before us, told Lindsay that there was some objection about a right of way. He must have been aware, therefore, when the negotiation for this purchase was pending, and when the representations to which I have referred were made by him, that the right of way had been objected to and was open to question; but he made no mention of this to the purchaser's agent. Assuming, then, the agreement set up by the vendor to have been made on the part of the purchaser, it must, I think, be referred to the representations which had been made on the part of the vendor, and under the circumstances I have mentioned it cannot, I think, be made available against the purchaser. The purchase agreement, too, in this case, is sworn to have been made,

and I feel no doubt that it was made, upon the faith of the representations on the part of the vendor; and with all respect, therefore, to the opinion of the Vice-Chancellor, my opinion is, that unless the plaintiff desires an inquiry as to the right of way, this bill ought to be dismissed; and I think the decree must be varied accordingly, but I think there should be a fixed sum for costs, including the costs of the appeal.

* 787

* CLEGG v. EDMONDSON.

1857. January 22, 23, 24, 26, 27. March 17. Before the LORDS JUSTICES.

Managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease and carried on business with uniform success without any outlay beyond what the produce of the mines was more than sufficient to meet. The excluded partners continually asserted their right, which, however, was always denied by the others, to participate in the profits, but took no active steps to enforce it for nine years: *Held*, that they were precluded by laches from obtaining any relief either in respect of the profits after the dissolution, or of the other partners having bid at the sales of the partnership effects at the dissolution, notice having at the time been given of their intention to do so.¹

Seem, per Lord Justice TURNER, that the rules as to laches and acquiescence which govern cases of direct trust, and apply to property of an ordinary character, do not apply to constructive trusts affecting property like mines, subject to extraordinary contingencies and capable of being rendered productive only by a large and uncertain outlay.

That the continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded.²

That although it cannot be laid down that in no case can a partner during the partnership contract for a new lease, to himself exclusively, of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere intimation to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest, although the partnership is at will.³

¹ See *Graham v. Birkenhead &c., Railw. Co.*, 2 Mac. & G. 146, n. (2) and cases cited; *Hart v. Clarke*, 6 De G., M. & G. 232; S. C., 6 H. L. Cas. 633; *Fry Spec. Perf.* (2d Am. ed.) 417, § 716; *Lewin Trusts* (5th Eng. ed.), 152.

² See 2 *Lindley Partn.* (Eng. ed. 1860) 760, 762, 763 and n. (v); *Lewin Trusts* (5th Eng. ed.), 152.

³ See *Clegg v. Fishwick*, 1 Mac. & G. 298 and n. (1) and cases; *Leach v.*

THE bill in this cause was filed for the purpose of fixing a trust for the benefit of the plaintiffs upon two leases of mines, dated respectively the 30th March, 1837, and the 11th December, 1846 — for relief against the dissolution of a partnership in the working of these mines, which subsisted up to the 30th September, 1846, and against the proceedings adopted by some of the defendants for the dissolution and winding-up of that partnership — and for an account of the property of the partnership, and of the profits of the mines as well before as since the time when the partnership was alleged to have been dissolved.

The circumstances of the case were as follows : —

By a lease dated the 30th September, 1805, some mines, called the Cliviger Copyhold Mines, were demised by the Duke and Duchess of Buccleugh to several persons for the term of twenty-one years from the 29th September, 1805. By another lease dated the 27th of * December, 1810, some * 788 other mines, called the Cliviger Freehold Mines, were demised by Mr. Towneley to several other persons, for the term of twenty-one years, from the 20th November, 1810.

By an agreement dated the 13th of February, 1818, John Green (hereinafter distinguished by the description of "John Green of Lamb Row"), Roger Green, William Beanland, and Henry Clegg, the then surviving lessees under the lease of 1805, and John Collinge, John Haigh, William Edmondson, and Robert Ormerod, the lessees under the lease of 1810, agreed to become partners in working both the freehold and copyhold mines, and in the capital and stock, machinery and utensils employed therein, for the then residue of the term of twenty-one years, granted by the lease of the freehold mines, Collinge, Haigh, Edmondson, and Ormerod each taking one-fifth, and the other four partners taking the remaining fifth between them in equal shares. By this agreement it was, amongst other things, agreed between all the parties, that in case any one or more of them should at or previous to the expiration of the term in the freehold mines obtain or procure any fresh or renewed lease of all or any of the mines, seams, and beds of coals or collieries within the said township of Cliviger, such lease, and all interest, benefit, and advantage to arise or accrue

Leach, 18 Pick. 68; Lewin Trusts (5th Eng. ed.), 148; 1 Lead. Cas. in Eq. (3d Am. ed.) 87, 88; Burdon v. Barkus, 3 Giff. 412; 8 Jur. N. S. 130; affirmed on appeal, 8 Jur. N. S. 656; 31 L. J. Ch. 521; 4 De G., F. & J. 42.

therefrom, should belong to and be enjoyed by all and every the parties thereto, their respective executors, administrators, and assigns, in such shares and proportions as were thereinbefore expressed. And it was further agreed between all the parties, that no fresh partner or partners should be admitted or received into the copartnership or undertaking without the concurrence in writing of all the existing partners, and the executors or administrators of every deceased partner, in case any such there

* 789 should be (other than and except * only the person or persons who might purchase the share or shares of any of the copartners in pursuance of the proviso thereafter contained, and then only in respect of such share or shares). Provided always, and it was thereby further agreed between all the parties, that in case one or more of them, their or his executors, administrators, or assigns, should at any time thereafter during the said term of fifteen years become bankrupt or insolvent, or should propose to sell their or his share or interest in the said mines and collieries and copartnership business or undertaking, then and in such case it should be lawful for the other partners or partner or any of them, to purchase the share or shares of the party or parties so becoming bankrupt or insolvent, or proposing to sell; of and in the said mines and collieries and copartnership undertaking.

On the 30th of September, 1825, a reversionary lease of the Cliviger Copyhold Mines, for the term of twenty-one years from the 29th of September, 1825, was granted by the Duchess of Buccleugh to Mr. Towneley, and by an agreement dated the 16th of January, 1829, Mr. Towneley agreed to assign this reversionary lease to John Haigh, John Collinge, Henry Clegg, and the executors of William Edmondson, being some of the persons who were then partners in working the mines under the agreement of the 18th of February, 1818. The agreement of the 16th of January, 1829, contained a stipulation on the part of Mr. Towneley, that if at the end of the lease of the Cliviger Freehold Mines (the lease of the 27th of December, 1810) he and the lessees should not agree for the further lease thereof, he would not work the freehold collieries and coal mines, nor let the same to any other person or persons for that purpose, until after the expiration of the lease of the 30th of September, 1825, but would permit the said col-

* 790 lieries and * coal mines to remain dormant and unoccupied for the benefit of the said lessees until they should have

finished the term in the copyhold mines. By virtue of this agreement to assign, the copyhold mines continued to be worked by the partnership till 1846. The Cliviger Freehold Mines, after the expiration of the lease of 1810, continued to be worked by the partners, the lessor allowing them to hold over.

By a lease dated the 30th of March, 1837, being one of the leases of which the plaintiffs claimed the benefit, Mr. Towneley demised the mines under other lands in Cliviger to James Collinge and James Haigh for the term of twenty-one years from the 30th of March, 1837. James Collinge was not an original partner under the agreement of February, 1818, but had become a partner under the will of his father, who was a party to that agreement. James Haigh was not at the date of this lease interested in the freehold and copyhold mines, but afterwards became interested in them. The mines demised by this lease formed a distinct colliery, called the Bankwell Colliery, and these mines were worked by the two lessees to whom they were demised down to some time in the year 1841, at which time the two lessees ceased to work them, it being objected by the parties interested under the agreement of the 13th of February, 1818, that the mines were reached by the above-mentioned stipulation on the part of Mr. Towneley, contained in the agreement of the 16th of January, 1829. In consequence of this objection these mines were not again worked until the partnership created by the agreement of 13th February, 1818, was assumed to have been dissolved, and the profits which had been derived from working them down to 1841, were brought into the accounts, which were made up upon the occasion of that alleged dissolution.

* In the year 1846, all the lessees under the leases of the * 791 30th of September, 1805, and the 27th of December, 1810, who had been parties to the agreement of the 13th of February, 1818, were dead, except John Haigh. There had been various sales and devolutions of the shares held under that agreement, and a large number of persons had become interested under it. The devolution of interests, so far as it need be stated, was as follows: —

John Green of Lamb Row, one of the parties to the agreement, and who was entitled under it to one-twentieth share, died in the year 1827, having made his will, dated the 30th of June, 1827, and thereby after stating that he had a share in certain collieries at Cliviger, Altham, and other places, he declared that his son John

Green of Accrington should have 50*l.* a year from the produce of the said collieries for being the book-keeper, likewise for the care and management of them, and that whatsoever other property arose or accrued from the said collieries, besides paying him 50*l.* yearly, the overplus money should be equally divided amongst his son John, his daughters Sally, Jane, Alice, and Margaret, to them and their heirs as tenants in common during the term of the lease granted to him; and he appointed John Green of Accrington and several other persons to be his executors. The plaintiff Jane Clegg was the daughter Jane mentioned in this will, and thus became interested in the share of John Green of Lamb Row.

John Green of Accrington purchased some small share belonging to another person, and it was alleged by the bill that he made that purchase with the profits of the share of John Green of Lamb Row. He died in the year 1842, having by his will appointed the defendant James Green and two other defendants named Dewhurst and Chaffer to be his executors.

* 792 * Henry Clegg, another of the parties to the agreement of the 13th of February, 1818, and who was entitled under it to another one-twentieth share, died in the year 1836 intestate, and the plaintiff Jane Clegg was his widow and personal representative, and thus interested in his share, in which the other plaintiffs also claimed to be interested as some of his next of kin.

John Haigh, another of the parties to the agreement, and who was entitled to one-fifth share under it, was living in 1846, but afterwards died and was represented in the suit by the defendant, James Haigh.

Wm. Edmondson, another of the parties to the agreement, and who was also entitled to one-fifth share under it, died in the year 1828, and his share passed to his executors Bernard Edmondson and John Barrowclough.

John Collinge, also a party to the agreement, and also entitled to one-fifth share under it, died in the year 1832, having made his will, dated the 4th of May, 1831, whereby he bequeathed to his sons James Collinge and Giles Collinge, both since deceased, all his leasehold estate and interest in his collieries within the township of Cliviger, to hold to them, their executors, administrators, and assigns as tenants in common, and appointed his sons John Collinge, James Collinge, and Giles Collinge the executors of his will. Giles Collinge, who was entitled to a moiety of the share of

the original John Collinge, died in 1836, having by his will appointed his brother James Collinge and Felix Leach to be his executors.

The conduct of the partnership business appeared from a very early period to have been intrusted to some of the partners as managers, and for some time previous * to and in the year * 793 1846, the managing partners were John Haigh, James Collinge, Bernard Edmondson, John Barrowclough, and James Green. James Green was placed in the management as representing the interests (amongst other persons) of the persons who were entitled to the shares of John Green of Lamb Row, and Henry Clegg.

In the year 1846, when the lease of the 30th of September, 1825, which would expire on the 29th of September, 1846, was approaching its termination, the five managing partners above named determined to dissolve the partnership for working the mines, and if they could succeed in doing so, to obtain for themselves a lease of the mines to the exclusion of the other partners. From the evidence in the cause it appeared that this determination on the part of the managing partners had become known to Robert Clegg (who had at that time become interested in Henry Clegg's share and assumed to represent the interest of the other members of the Clegg family) at least as early as the month of June, 1846. He objected to the managing partners obtaining the lease for themselves exclusively, and appeared to have proposed that he should be admitted to the benefit of the lease on behalf of the Clegg family, but that others of the partners should be excluded. This, however, was not acceded to by the managing partners, it being considered, that from the determination of the lease of the 27th of December, 1810, the partnership had subsisted as a partnership at will only. The managing partners in the month of July, 1846, served on the other partners a notice for dissolving the partnership on the 30th of September, 1846.

In the mean time, Mr. Towneley had been in treaty with the lessors of the copyhold mines for a renewed lease to him of the copyhold mines, and on the 4th of * August, 1846, a * 794 renewed lease of the copyhold mines was agreed to be granted to him by the Duke of Buccleugh for a further term of twenty-one years. The five managing partners had also in the mean time been in treaty with Mr. Towneley for a new lease to be

granted to them of both the copyhold and the freehold mines, including the Bankwell Colliery, and on the 12th of August, 1846, they agreed for a new lease of all those mines for a further term of twenty-one years. In September, 1846, they issued hand-bills and published advertisements for the sale of the stock at the several collieries on the 29th of September, 1846, and they sent copies of the hand-bills to the other partners with the following notices indorsed thereon: —

“ We, the undersigned John Haigh, James Collinge, Bernard Edmondson, John Barrowclough, and James Green, being five of the partners or persons interested in the stock in trade described in and by the within advertisement, and having made arrangements with Peregrine Edward Towneley, Esq., the landlord of the premises, for granting of a fresh lease to us of the same or other premises adjoining or near thereto upon and after the expiration of the present lease on the 29th day of September instant, hereby give you notice that we do intend, either by ourselves or by some other proper person whom we shall appoint as our agent for that purpose, to bid at the sale by public auction to be held at Cliviger on the said 29th day of September instant, pursuant to the within advertisement for the purchase of certain parts of the stock in trade and effects described and comprised in the within advertisement. And we hereby further give you notice, that it will be lawful and competent for you and all other persons whomsoever also to bid * 795 at the same sale for all or any part of the said stock * in trade and effects, subject to such conditions of sale as will be produced at the said sale.”

The conditions of sale referred to in the above notice were, as it appeared, prepared by one of the managing partners.

The stock at the collieries was accordingly put up to sale by auction on 29th September, 1846, and the principal part of it was purchased at the auction by or on behalf of the managing partners. The managing partners then proceeded to have the accounts of the partnership made up and a release prepared, and on the 7th of October, 1846, their solicitors sent to the plaintiff Jane Clegg the following letter: “ Madam, — We are instructed to inform you that the partnership in the Cliviger Collieries expired on the 30th of September last, and that the stock and effects of the said partnership have been sold and converted into money, and also that the

accounts of the said copartnership are now being made out by an experienced professional accountant, and will be ready for inspection and examination on and after the 15th day of October instant. And we are also to inform you that the managing partners in the said late copartnership will attend at the Swan Inn, at Burnley, on the said 15th day of October, at ten o'clock in the forenoon, for the purpose of producing the said accounts for your inspection and examination, and they will be prepared then and there to pay to you your due proportion of the said partnership estate and effects upon your executing a proper release for the same."

Neither the plaintiff Jane Clegg nor any of the other plaintiffs in any manner adopted or acted upon the accounts or executed the release, and consequently what upon the accounts was coming to the estate of Henry * Clegg was paid into a bank * 796 to answer the claim of that estate, and what was coming in respect of the share of John Green of Lamb Row was left in the hands of James Green. The managing partners and some of the other partners took what was coming to them upon the accounts, and executed the release.

On the 11th of December, 1846, the new lease to the managing partners was executed, being a lease for a term of twenty-one years from the 29th of September, 1846. From the termination of the partnership the mines were worked by the managing partners upon the terms of the new lease, and were so worked without interruption until the filing of this bill in the year 1855.

There were other matters of account between the plaintiffs and the defendants James Green, Dewhurst, and Chaffer, and in the year 1847 these matters were settled and a release executed by the plaintiffs to those defendants. By this release the plaintiffs expressly reserved their claims to a continuing right of participation in the effects of the partnership, including the renewed lease.

There were some other mines at Altham distinct from and of greater value than the Cliviger Mines. The estates of Henry Clegg and of John Green of Lamb Row were entitled to shares in the Altham Colliery. The managing partners of these mines, amongst whom was one of the defendants sought to be made liable in this suit, had, in the year 1846, obtained a new lease of those mines, which they insisted upon holding for their own benefit. The plaintiff Jane Clegg and the defendants James Green, Dewhurst, and

Chaffer stood in the same relation to each other with regard * 797 to the Altham Colliery as with regard to the * Cliviger Colliery, except that in the case of the Altham Colliery those defendants were among the persons sought to be excluded from the benefit of the renewed lease. In the year 1849 the plaintiff Jane Clegg and some other of the excluded parties instituted a suit of *Clegg v. Fishwick* for the purpose of subjecting the new lease of the Altham Mines to a trust for their benefit, and in December, 1852, they obtained a decree in their favour in that suit. (a)

In the year 1848, a suit of *Collinge v. Collinge* was instituted by the persons claiming under the will of Giles Collinge against James Collinge and Felix Leach, the executors of Giles Collinge, in which a decree was made in the year 1855 establishing the rights of the parties interested under the will of Giles Collinge to a share in the colliery carried on under the lease of the 11th December, 1846. This decree was appealed from, and the appeal was compromised by a consent order dated the 10th of July, 1855, upon terms very beneficial to the parties interested in the estate of Giles Collinge.

The plaintiffs, throughout the whole period which elapsed from the renewal in 1846 up to the institution of this suit, insisted on their right to participate in the benefit of the renewed lease, and it was not alleged that any of the defendants had ever been led to suppose, or had supposed, that the plaintiffs had abandoned their claim. No step, however, was taken by the plaintiffs to enforce their rights until this bill was filed in the month of September, 1855. The plaintiffs alleged that they had abstained from taking proceedings until the suits of *Clegg v. Fishwick* and *Collinge v. Collinge* had been disposed of, inasmuch as they considered that the result of those suits would decide the question raised in * 798 the present * suit. It was established in the cause that the mine, from 1846, had been uniformly profitable.

The case first came before the Lords Justices, on an appeal from an order of the Master of the Rolls allowing exceptions to the answer of the defendants, who had declined to set out the accounts of the business. That appeal was not disposed of, but an arrangement was come to that the cause should be heard by their Lordships on an early day.

(a) See 1 Mac. & G. 294.

Mr. Roundell Palmer and *Mr. Little*, for the plaintiffs.— Apart from the question of delay, our right to participate in the benefit of the renewed lease is clear. *Lewin on Trusts*, (a) *Tudor's Lead. Cas. in Equity*, (b) *Rakestraw v. Brewer*, (c) *Rawe v. Chichester*, (d) *Fitzgibbon v. Scanlan*, (e) *Featherstonhaugh v. Fenwick*, (g) *Cook v. Collingridge*, (h) *Wedderburn v. Wedderburn*, (i) *Gillett v. Peppercorne*, (k) *Blisset v. Daniel*. (l) The notice of dissolution makes no difference. An actual dissolution would not have done so, for the new lease is attributable to the partnership assets, which were the property of all, and the new lease must therefore enure to the benefit of all. *Cook v. Collingridge*, (m) *Brown v. De Tastet*. (n) That a new lessee was introduced makes no difference: *Edwards v. Lewis*; (o) nor does the circumstance of the lease of 1846 containing a proviso against alienation. The same circumstance occurred in *Clegg v. Fishwick*. (p) Then as to delay, the case is * wholly different from *Norway v. * 799 Rowe*, (q) *Senhouse v. Christian*, (r) and *Prendergast v. Turton*, (s) where the property was speculative. Here the business has been uniformly profitable from its commencement. Moreover, those cases proceeded on the ground that a person is not at liberty to lie by and let other persons incur the risk alone without offering to share it, and then come in for a share of the benefit. Here we continually insisted on our right; we were willing to take our share of the risk, but the defendants would not let us. That they alone incurred the risk is their fault, not ours, and they cannot use it as an argument against us. We told them that we should wait until the case of the Altham Mines was discussed, which involved the same principle. It was not decided till December, 1852, and it was reasonable that we should wait till then. In *Brown v. De Tastet* (n) the delay was excused on a ground not so strong as ours; and *Wedderburn v. Wedderburn* (t) affirms the

(a) Page 170 (2d ed.).

(b) Vol. I. p. 35.

(c) 2 Peere Wms. 510.

(d) Ambl. 715.

(e) 1 Dow. 269.

(g) 17 Ves. 298.

(h) Jac. 607.

(i) 2 Keen, 722; 4 M. & C. 41.

(s) 1 Y. & C. C. C. 98; affirmed, 13 L. J. (N. S.) Ch. 268.

(t) 4 M. & C. 41.

(k) 8 Beav. 78.

(l) 10 Hare, 493, 528.

(m) Jac. 607, 619.

(n) *Ib.* 284.

(o) 3 Atk. 538.

(p) 1 Mac. & Gor. 294.

(q) 19 Ves. 143.

(r) *Ib.* 157, cited.

principle. In the former case there was a delay of six years; in the latter, twenty. *Hart v. Clarke* (a) supports our case, on the ground that there was not any lying by, but a constant assertion of our right.

Mr. Selwyn and *Mr. Roxburgh* for Edmondson, Barrowclough, and James Haigh. — We admit that a right to an account of the dealings and property of the old partnership once existed, but we say that it is barred by lapse of time. As to the renewed lease, we say that the plaintiffs never had any right to it, and that if they had they have lost it by delay. This was a partnership at * 800 will, which could be dissolved * at any time by any partner, and we contend that it was effectually dissolved as against the plaintiffs in 1846. It is alleged against us that before 1846 we executed works which could not pay unless we obtained a new lease, and that we left large masses of coal in order that the new partnership might have unfair facilities in working. Now *Mr. Towneley*, so far as regards the copyhold mines, was only a termor, whose term expired in 1846, the freehold being in the Duke of Buccleugh; and it is absurd to suppose that we expended capital in the expectation of obtaining a new lease from the Duke of Buccleugh, with whom we had no connection. We had a right to dissolve the partnership in 1846, and to discharge for our protection all the liabilities which the partnership was under to *Mr. Towneley*. Notice was given to the plaintiffs of what we intended to do, and they had the same opportunities as we. The argument of the plaintiffs proceeds on a series of fallacies. They say that this case is on all fours with *Featherstonhaugh v. Fenwick*, (b) and the other cases of that class; but in those cases there was unfair dealing, and there is no rule to prevent a partner from dissolving a partnership and taking a fresh lease to himself if his mode of proceeding is fair.

[THE LORD JUSTICE KNIGHT BRUCE. — Does not the application of the rule depend upon this, — who were entitled to the interests the existence of which gave facilities for obtaining a new lease?]

(a) 6 De G., M. & G. 232; affirmed 6 H. L. Cas. 633.

(b) 17 Ves. 298.

[THE LORD JUSTICE TURNER. — Do you say that a trustee could renew for his own benefit?]

We admit that a trustee could not renew for his own benefit, but here there was no trust. The parties were similarly interested, all was open and above-board, and the plaintiffs might have applied for the renewed lease themselves. In most cases it cannot be known what the * result of an application by the party * 801 who complains of exclusion would have been. Here the evidence shows plainly that the landlord would not have granted a renewal to the plaintiffs. We had told the plaintiffs long before the renewal that we would rather abandon the mine than go on in partnership with them. Under these circumstances, we being unwilling to continue the partnership and the landlord being willing to grant a new lease to us but not to them, and they having notice of our intention to renew for our own benefit, are we, because we took a renewal, to be treated as having entered on a fresh term of partnership?

[THE LORD JUSTICE TURNER. — Can a partner renew for his own sole benefit before the expiration of the term which was partnership property?]

We say that he may in circumstances like those of the present case. If the plaintiffs meant to claim the benefit of the renewal, they ought to have given a counter-notice that they should insist upon a share in the benefit of the renewal. If we had actually agreed at the time to give the plaintiffs what they are now asking they could not have had it now: it would have been a case of specific performance, and they would have been barred by delay. As to the continual claim it makes against the plaintiffs, it shows that they were fully aware of their rights and knew that their title was disputed, yet they took no active step. *Heaphy v. Hill*, (a) *Chesterman v. Mann*. (b) The delay to 1852 is not sufficiently accounted for, since we never gave the plaintiffs to understand that we would be bound by the result of *Clegg v. Fishwick*, and the delay from 1852 to 1855 is not accounted for at all. In all the cases relied upon by the plaintiffs there was *mala fides*. In *Feath-*

(a) 2 S. & S. 29.

(b) 9 Hare, 206, 214.

erstonhaugh v. Fenwick (a) stress is laid on the circumstance that the * lease was applied for without notice to the other parties. In *Blissett v. Daniel* (b) there was an unfair settlement of accounts. Cases as to trustees and executors have no real bearing on the question; this disposes of *Edwards v. Lewis* (c) and *Griffin v. Griffin*. (d) Supposing, however, that this point is decided against us, the doctrine of *Prendergast v. Turton* (e) applies. The decision in that case was founded on the risks inseparable from all mining property, and time runs from the commencement of expenditure. The claimants knew that we were incurring great expenses and risks, that there was a profit does not prevent time from running. They knew nothing about that, and if they had known of it, still a loss might have occurred any day which would more than absorb all the previous profits, and we should have had no right to call upon them for contribution. The rule is, that a person who means to claim an interest in these hazardous undertakings must take to them for better or worse within a reasonable time. *Hart v. Clarke* (g) was taken out of the application of the rule by the fact that the plaintiff had a legal estate. Here the bill was not filed for eight years after the alleged right arose, and not until more than two years after the decision in *Clegg v. Fishwick*.

Mr. Cairns and *Mr. Giffard*, for James Green and other defendants. — The right of partners to the benefit of a renewed lease must depend upon circumstances. Here the landlord was equally accessible to all, the negotiations for a new lease began with * 803 him, and he wished to get rid of a * number of useless leases and have only a small body to look to. The plaintiffs were aware at the time of what was going on, and had distinct notice that those who were managing the mine intended to acquire a new lease for themselves, not for themselves and the plaintiffs. James Green cannot be regarded as a trustee even by implication. We contend, then, that *Featherstonhaugh v. Fenwick* does not apply, and that, even if a bill had been filed within a reasonable time after the renewal, it must have failed. Then after the renewal the plain-

(a) 17 Ves. 299, 300.

(c) 3 Atk. 538.

(b) 10 Hare, 493.

(d) 1 Sch. & Lef. 352.

(e) 1 Y. & C. C. C. 98; S. C., on appeal, 13 L. J. (N. S.) Ch. 268.

(g) 6 De G., M. & G. 232; 6 H. L. Cas. 633.

tiffs lie by to see how the concern will turn out. There is no pretence that the defendants practised any concealment, and every argument which the plaintiffs use in support of their original right tends to make their case worse on the point of delay. Up to the time of the filing of the bill in *Clegg v. Fishwick*, nothing was done beyond making parol claims. It would be unjust to attach any weight to such claims: *Attorney-General v. Sheffield Gas Consumers' Company*; (a) as it would be allowing the claimant to keep up a one-sided state of things, for such a claim would not entitle the other party to call on him for contribution. Time must run from the time when the parties were first aware of their rights. In the case of the Altham Mines it could not begin to run till 1849; here in 1846. Moreover, the renewal in the former case was clandestine; here it was not. The pendency of that suit is not an excuse for delay; we had not agreed to be bound by the result of it. The decree, if any decree is made at all, should give an account only from the filing of the bill. A receiver and manager to carry on the mines ought not to be appointed, for we decline partnership with the plaintiffs; and a receiver should only be appointed with a view to a sale. *Roberts v. Eberhardt*, (b) *Crawshaw v. Maule*. (c) If a bill had been filed in 1846, all that the Court could have done for the plaintiffs would have been to give them a decree for dissolution with a sale, and they ought not to have any more now. To give them more would be to give them the benefit of our labour and of the risk which we have run by taking a new lease with burdensome covenants. *Townshend v. Warren*, (d) *Hardman v. Johnson*, (e) *Randall v. Russell*, (g) *Aitchison v. Fair*. (h)

Mr. Elmsley and Mr. G. Lake Russell, for the executor of James Collinge. — The plaintiffs never had any title except in conscience. It is a constructive trust, and their title has no analogy to a legal title. *Bond v. Hopkins*, (i) *Smith v. Clay*. (k) Such a right cannot be kept alive by mere assertion of it. Acqui-

(a) 3 De G., M. & G. 304.

(b) Kay, 148.

(c) 1 Sw. 495, 523.

(d) 1 Jones & Lat. 221, n.

(e) 3 Mer. 347.

(g) 3 Mer. 190.

(h) 3 Dr. & War. 524.

(i) 1 Sch. & Lef. 413.

(k) 3 B. C. C. 640.

escence is not needed to bar it. Mere delay will have that effect, as in cases of specific performance; and here, not to dwell on other periods, there is a delay from 1852 to 1855 wholly unaccounted for.

Mr. Hamilton Humphreys and *Mr. Pole* appeared for other defendants in the same interest.

Mr. Palmer, in reply. — In suits in equity time has to be considered in two different ways; as to its effect in barring a right to property, and as to its effect in barring an equity enforceable against property. The defendants confound these two operations. Here we claim a proprietary right. There is the identical plant * 805 and the mine, which, though not identically * the same, is the fruit of the property in which we had a share. This proprietary right, if legal, would not have been barred till the expiration of twenty years, and, by analogy, a less period will not have that effect in equity. To shorten this period, acquiescence amounting to an assent to the retainer of the property by others must be established, — conduct which leads other parties to believe and to act on the belief that the title will not be enforced, and this makes it a breach of faith afterwards to enforce it. *Hawker v. Hallewell*, (a) *Prendergast v. Turton*, (b) *Hart v. Clarke*, (c) all recognize this as the principle. Here there was nothing approaching to acquiescence. Our delay did not induce the defendants to alter their position. Whatever they may now say, it is absurd to suppose that our claiming to be partners in 1846 would have induced them to abandon the concern: it was too profitable for them to take such a step. The undertaking was not an “adventure,” for the mine had been proved and was a known profitable concern. The defendants acted with full notice of our claim, and were in no way misled. We have left nothing undone which we should have had to do if we had been acknowledged all along as partners, no contribution to expenses having been required. If the defendants intended to insist on time as a bar, they ought to have given us notice to enforce our claim within a reasonable time.

(a) 2 Jur. (N. S.) 537, 794.

(b) 1 Y. & C. C. C. 98; 13 L. J. (N. S.) Ch. 268.

(c) 6 De G., M. & G. 232; 6 H. L. Cas. 633.

They have not done so, and having been aware all along that we insisted on our right, they cannot insist upon so short a period as a bar. *Penny v. Pickwick.* (a)

Judgment reserved.

March 17.

* The Lord Justice TURNER, after stating the facts to the * 806 effect of the above statement, proceeded as follows: It will be convenient first to consider the case as it stands upon the lease of 1846. The *onus* of this case rests, as I think, upon the defendants, the managing partners. Having stood in a confidential relation, both as partners and as managers, the consequences which, according to the ordinary rules of this Court, flow from that relation must attach upon them, unless they can by some means exonerate themselves from those consequences. The case on their part was put upon two grounds: 1st, that the plaintiffs never were entitled to the benefit of the new lease; and, 2dly, that if the plaintiffs were at any time entitled to the benefit of that lease, they have lost that right by delay and acquiescence.

The defendants' argument on the first point was rested on several grounds, — that the partnership which had subsisted to the 29th of September, 1846, was a partnership at will only; that the landlord would not have renewed to all the partners; and that all the partners knew of the intention on the part of these defendants to apply for the new lease, and had the same means of applying to the landlord on their own behalf as these defendants themselves had. The argument founded on the partnership being dissoluble at will is not, I think, entitled to any consideration. The principle on which the Court proceeds in cases of this nature is, the confidence which subsists between partners, and that confidence exists whether the partnership subsists for a limited time or is dissoluble at will. I attach as little weight to the argument founded on the landlord's objections. That argument is, I think, disposed of by * Lord ELDON's judgment in *Fitz- * 807 gibbon v. Scanlan.* (b) More consideration is, I think, due to the argument founded on the knowledge by all parties of the intention of these defendants to apply for the lease and the means

(a) 16 Beav. 246.

(b) 1 Dow. 269.

which the other parties had of applying for it themselves. I am not prepared to say that in no case can a partner during the continuance of the partnership contract for a new lease to be granted to himself of property which is in lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. The authorities, I think, do not warrant that position; but this, I think, is plain upon all the authorities, that it is very difficult for any partner to secure to himself to the exclusion of his co-partners the benefit of a lease so contracted for, and the difficulty is certainly greater where the contracting partners are, as in this instance they were, the managing partners. In order to give validity to such a transaction, all the parties ought to be placed upon an equal footing, and it is difficult to see how this is to be accomplished in the case of managing partners. It is not, however, necessary to decide what would be held sufficient to support such a transaction in the case of managing partners. It is sufficient for me to state that the mere communication of the intention on the part of the managing partners to apply for the new lease for their own benefit could not, in my opinion, be sufficient for the purpose. I do not find that the defendants, the managing partners, in this case made any further communication, and I am of opinion, therefore, that upon the first point the defendants' case cannot be supported.

We have to consider then the question of delay and acquiescence, and in determining the effect due to these

* 808 * considerations, we must take into account both the nature of the right which is claimed and of the property in which it is claimed. We have to deal in this case, not with a direct but with a constructive trust, not with property subject merely to the ordinary contingencies by which all property is affected, and maintained at a moderate and scarcely varying expense, but with mining property which is subject to extraordinary contingencies, and which can be rendered productive only by a large and uncertain outlay. The authorities, I think, fully warrant us in saying that the rules which govern cases of direct trust, and apply to property of an ordinary character, are not equally applicable to cases of constructive trust, and to property of the description which we have here to deal with. It was said indeed, on the part of the plaintiffs, that these mines had been tried, and that there was no uncertainty attaching to the value of them, but I do not

find from the evidence that they had been explored to any such extent as could render their value certain, and, on the contrary, the evidence shows that faults were met with in the workings under the new lease, and the expense of the workings would of course depend upon the nature and extent of these faults. What expenditure they would occasion, or to what extent they would affect the value of the mines, could not of course be foreseen. If they had led to ruinous expenditure, and had rendered the mines unproductive, nothing would of course have been heard of this claim of the plaintiffs, and there would have been no claim against them. Are they then in justice entitled to reap the benefit when they could not have been made subject to the loss? It is said for the plaintiffs that the expenditure has been more than met by the profits, but this does not seem to me to vary the case, for the profits undoubtedly belonged wholly to the lessees, unless the plaintiffs were entitled to share in them, and to assume *that * 809 the lessees were not expending their own money would be to assume that the plaintiffs were so entitled, which is the very question we have to decide. Now what has been the conduct of these plaintiffs? Before the termination of the old partnership they knew that the defendants intended to apply for the new lease, if not that it had been actually agreed to be granted. They took no steps to prevent the lease being granted. From the period of the termination of the old partnership they have known that the defendants have been working these mines and incurring expenditure upon them, and until the filing of this bill in the month of September, 1855, they have not taken a single active step in prosecution of the claim which they have now set up. This conduct on their part is, I think, sufficient to shift the *onus* of the case and throw it upon them. Then what is their justification? There is an attempt to show something like an agreement that the claim to an interest in these mines should abide the result of the claim to an interest in the Altham Mines, but I am satisfied upon the evidence that there was no such agreement. Then the claim to the interest in the Altham Mines, and the pendency of the suit respecting it and of the suit of *Collinge v. Collinge*, were relied on without reference to the alleged agreement. But the suit as to the Altham Mines was not instituted until the year 1849, and upon this footing, therefore, a period of two years is left wholly unaccounted for. Besides, both that suit and the suit of *Collinge v. Collinge* were instituted not long

after the cause of suit arose, the Altham suit having been instituted in 1849, almost immediately upon the termination of the old lease of those mines, and the suit of *Collinge v. Collinge* having been instituted in the year 1848, and what might be done in suits commenced at more early periods could furnish no rule for

* 810 what would * be right to be done in a suit like the present, instituted after the lapse of so many years.

What the plaintiffs, however, mainly relied upon was the continual claim on their part, and no doubt they have not ceased to assert their claim, but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded. I am not aware that the mere assertion of a right has ever been held to avail against the Statutes of Limitations, and if, therefore, we look to the analogy of those statutes, that analogy does not seem to furnish any ground of excuse on the part of the plaintiffs. Much less, I think, can such an excuse be entertained by a Court of Equity, which, in cases of this nature, has gone beyond the analogy of the statutes. In my opinion, therefore, the defendants are entitled to our judgment in their favour upon this second point of their defence.

It was attempted on the part of the plaintiffs to derive some aid to their case as to the lease of 1846, from the fact of the lease of the Bankwell Colliery not having expired when the lease of 1846 was granted, and the plaintiffs also contended that in any event they were entitled to fix a trust upon the Bankwell lease, but it is clear upon the evidence, that the lease of the Bankwell Colliery was not originally taken for the benefit of the partnership, and that that colliery was not worked after 1841, and that it ceased to be worked at that time in consequence of objections raised by the partners in the concern in which the plaintiffs were interested, and the lease, as I understand the case, is not now subsisting, but was put an end to by the arrangement of 1846, and under these circumstances I think the plaintiffs can derive no aid to their

* 811 case from the subsistence of that * lease, and are entitled to no relief in respect of it. The reasons which have been assigned against fixing a trust upon the lease of 1846 apply with greater force against any equity which the plaintiffs might have had to set up as to the lease of this colliery.

A case is also made by this bill as to the sale of the plant ; but

I think the same reasons which govern our decision as to the other parts of the case apply to this part of the case also. The plaintiffs had notice of this sale, and that the managing partners intended to bid. They might if they had thought fit have attended the sale and have bid for themselves, and they were invited to do so. They might have impeached the sale, as they might have impeached the lease, at a more early period, but at this distance of time I think they cannot be permitted to do so. If they desire an account of the proceeds of the sale and of the profits of the mines from the date of the last settlement on their behalf, I think they are entitled to it, reserving the costs, but in other respects I think this bill must be dismissed, though certainly without costs.

THE LORD JUSTICE KNIGHT BRUCE. — In the observations that I propose to make on this cause it may be convenient, and it is my intention, to describe the persons in whom from time to time and for the time being ever since the year 1845 have been vested the rights, interests, and claims upon which the plaintiffs found their case and are proceeding, — to describe them all, I say, including the plaintiffs, by the single name of Robert Clegg, one of the number; and, although James Collinge lately a defendant is dead, to designate by his single name all the lessees named in the lease in dispute, namely, that of December, 1846, and those who * 812 time to time have claimed the benefit of it adversely to the persons whom I describe under the name of Robert Clegg. I think it an immaterial circumstance that one of the lessees of December, 1846, was not (if in truth he was not) interested in or under the lease that expired in September, 1846, for all the others of them were so interested. Nor do I consider it necessary to decide the question whether the lease of December, 1846, was a lease in the benefit of which Robert Clegg was entitled to participate, — I assume Robert Clegg to be entitled to have that question decided in his favour, but decided subject to the other defence or defences on which James Collinge, upon that hypothesis, relies.

The trust, however, by which I thus assume James Collinge to have been affected as to the lease was what lawyers call a constructive trust, not one declared or expressed, and there are some considerations applicable to the former that are inapplicable to the latter, as various authorities show. Here the right of Robert Clegg (a right merely equitable) arose from his beneficial interest

in a former lease or former leases of the mines comprised in that of December, 1846, which former lease or former leases had expired in or before the preceding September,—in which James Collinge had also been interested,—and under which he was, on behalf of all interested for the time being, the worker and manager of the mines throughout September, 1846, and for a considerable period next before that time.

Now the bill in this cause was not filed before September, 1855, and the main subject of dispute being an alleged equitable right to participate in the profits of mines, a right which commenced, if at all, in the year 1846, the question arises whether the suit has been instituted too late. Can Robert Clegg under such a * 813 bill * obtain the relief which he would, I assume, have been entitled to obtain if he had commenced his suit in 1846 or early in 1847? He was not in the year 1845 nor has at any time since been under any disability, and he has, ever since the determination of the last expired lease, been, uniformly excluded from the mines and all participation in their produce or profits, perfectly aware during the whole time of his alleged rights, nor ignorant of any material fact, and especially not ignorant that his title and his claims were uniformly denied and opposed, as they were uniformly denied and opposed, by James Collinge; he nevertheless, as I have said, institutes no suit until September, 1855: nor was James Collinge on his side ignorant of any material fact at any time, and especially he was all along aware that Robert Clegg, deeming the exclusion wrongful, alleged continually a title to participate in the profits. But Robert Clegg did nothing. James Collinge on the other hand was continually working the mines, expending money and bestowing his time, labour, and skill upon them, with a view to his own profit alone.

Robert Clegg's apologies for delay are,—that he continually claimed and did so to the knowledge continually of James Collinge; that there is no bar from any Statute of Limitations; that if the subject in dispute had been an ordinary farm of which James Collinge had been receiving the rent, instead of mines which he worked, there would have been no answer to the suit; and that the mines having been (as they have in fact been) uniformly prosperous, nor having required (as in fact they have not required) any outlay which the produce did not more than meet and cover, and James Collinge having, from his long acquaintance practically with

the property, known (as he must be taken in fact to have known) all along its probable safety and probable advantages, * there is no reason for treating or dealing with the claim, * 814 otherwise than as a similar claim in respect of an ordinary farm of which James Collinge had been receiving the rents might properly be.

This argument is plausible, but has not convinced me. A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention, and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight, and examination afford a sure guarantee against sudden losses, disappointments, and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should show himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.

There was here, in my opinion, no sufficient apology, no excuse for the delay from 1846 to 1855. The existence of the suit respecting the Altham Mine was and is immaterial, and even that suit, commenced not before the year 1848, was determined in or before 1853. I think, therefore, that as to the lease of December, 1846, and the produce of the mines from the expiration of the lease that expired in September, 1846, the bill should be dismissed, but, I agree, without costs.

If the plaintiffs desire an account of what, if any thing, is due to them in respect of produce and profits before that expiration, without disturbing or going above the last settled account, which I understand to have been in 1845, I think that they may have it; and they should be paid, I conceive, with interest their shares of the value of the rails, plant, and stock, in and about the mines * at that time. But after the full notice given in Septem- * 815 ber, 1846, of the intentions of the new lessees, the knowledge that all concerned then had, and the length of time allowed to pass before the commencement of the suit, the plaintiffs must, in my opinion, be bound by the prices produced at the sale, however irregular the biddings, and however null the proceedings would, to a great extent at least, have probably been deemed to be, if properly disputed in good time. As to these portions of the case, how-

ever, the parties can, I suppose, with respect both to principal and to interest, make an arrangement among themselves without prejudicing any right of appeal to the House of Lords as to the residue.

COX v. BISHOP.

1857. March 2, 3, 27. Before the LORDS JUSTICES.

An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee are not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease.

THIS was an appeal by the defendants Bishop, Livesley, and Powell, who were equitable assignees of a lease, from an order of the Master of the Rolls overruling a demurrer for want of equity to a bill by the landlords.

The following is the substance of the statements of the bill.

By an indenture of lease dated the 1st of December, 1852, the plaintiffs demised to Richard Smethurst certain beds of coal and marl under some closes of land at Hanley, and the surface of one of the closes, reserving a minimum rent of 300*l.* for coal, and of 100*l.* for marl, and a fixed rent of 6*l.* for the surface of the demised close. By this lease Smethurst covenanted to * 816 work * and continue to work the mines in a proper manner, not to assign without the consent in writing of the lessors, and to make good all damage done to the surface or to any buildings upon the land. There was a proviso for re-entry on non-payment of rent or breach of covenants.

At the time of the execution of the lease, it had been agreed between Richard Smethurst the lessee and Joseph Smethurst (since deceased), who was a brother of the lessee, and was in possession of all of the closes of land under which the mines lay, except the close the surface of which was comprised in the lease, that Joseph Smethurst should be interested in the lease equally with Richard Smethurst. This fact was known to the plaintiffs, and the lease was granted to Richard Smethurst for the benefit of himself and his brother Joseph. Richard and Joseph Smethurst

commenced sinking a shaft and working the mines in the usual mode, but soon after the date of the lease they, without the sanction or privity of the plaintiffs, associated with themselves a Mr. James Weatherburn in working the mines. The working was carried on by these persons until June, 1853, at which time an agreement was entered into between Richard Smethurst and James Weatherburn of the one part and Joseph Smethurst, Wykeham Wheeler and Frederick Bishop of the other part, whereby it was agreed that Richard Smethurst and Weatherburn should give up their right and interest in the lease and in the colliery, mines, machinery, and premises comprised therein to the parties of the second part, and that they would do and execute all reasonable and necessary acts and deeds for carrying out that agreement and for vesting the colliery in the parties of the second part, and that in the mean while and until the execution of such deeds the agreement should have the same force and effect, and the * parties of the second part should be at liberty to act * 817 as if such deeds had been already executed.

Joseph Smethurst, Wykeham Wheeler, and Frederick Bishop entered upon the premises under this agreement, and worked the colliery until the 3d of September, 1853, when Wheeler sold his share to the defendants Bishop, Livesley, and Powell, who worked the colliery in conjunction with Joseph Smethurst until his death in December, 1853.

After the death of Joseph Smethurst, Bishop, Livesley, and Powell continued in possession of the colliery and worked it until December, 1855, when they abandoned the further working, and by a deed dated the 22d of that month assigned the demised premises with the machinery and plant to one Matthew Fisher, who was a person of no substance.

The bill further alleged, that during the occupation by Bishop, Livesley, and Powell, and by Joseph Smethurst in his lifetime, very large quantities of coal had been raised, but that no rent or royalty, either as mineral or surface rent, had been paid, and that during their occupation the works had not been carried on properly, and that the demised premises had sustained great damage in consequence of negligence and improper working.

The bill charged that Joseph Smethurst, Wheeler, Bishop, Livesley, and Powell had occupied and worked the colliery and lands under the lease to R. Smethurst, and that they were well

acquainted with its provisions and stipulations, and that they had always held themselves out as assignees of the lease, and as entitled to the benefit thereof, but that the plaintiffs were not parties or privies to the agreement of June, 1853, nor to the sale to Bishop, Livesley, and Powell, nor to the assignment to Fisher, and that such agreement, assignment, and sale were frauds on the plaintiffs.

The bill, which was filed against Bishop, Livesley, Powell, Wheeler, and the executors of Joseph Smethurst, prayed that it might be declared that the defendants were liable to pay the surface rent and the minimum coal and marl rents up to the time of the assignment to Fisher, and that they were bound to compensate the plaintiffs for all loss sustained by them in consequence of the colliery not having been properly worked, — that the amount of such rents and compensation might be ascertained, and that the defendants might be decreed to pay it.

Bishop, Livesley, and Powell demurred for want of equity. The Master of the Rolls overruled the demurrer, holding that an equitable assignee of a lease, who has been put into possession and enjoyed the property as assignee, is liable in equity to the lessor for the performance of the covenants.

Mr. Lloyd and Mr. Shapter, for the appellants. — The question is, whether a person who by virtue of a contract with a lessee is entitled in equity to the lessee's interest is liable in equity to the landlord to the same extent as he would be liable at law if a legal assignment had been made. We say, first, that the contract itself cannot give the landlord any right to sue in equity, for it is a contract between other parties with which he has nothing to do.

[*Mr. Roundell Palmer*. — We do not allege that the contract alone, not followed by possession, would give the landlord any such right.]

Possession cannot alter the case, for it does not create any privity with the landlord. There is none between the landlord and an under-lessee in possession. The landlord has no equity to make a person his tenant who is not such at law and has entered into no contract with him. *Lucas v. Comer-*

ford (a) and *Flight v. Bentley* (b) are against us, but they were overruled in *Moore v. Choat*, (c) and the subsequent decisions have been almost uniformly in our favour. *Moore v. Greg*, (d) *Robinson v. Rosher*, (e) *Arkwright v. Colt*, (g) *Walters v. Northern Coal Mining Company*. (h) In *Jenkins v. Portman*, (i) there was a privity of contract between the parties to the suit; the defendant was landlord and was also the *cestui que trust* of an underlease of the same property, and it was rightly held that as between him and his lessee he could not throw upon the lessee the burden of doing things which, as between landlord and lessee, the lessee was bound to do, but, as between lessee and under-lessee, the under-lessee was the person bound to do. The Master of the Rolls, it is admitted, rests his judgment on *Lucas v. Comerford*, but there was a clear equity independently of that case. *Close v. Wilberforce* (k) was a case between the lessee and an assignee of the beneficial interest, and *Wilson v. Leonard* (l) was between vendor and purchaser, between whom there is a privity of contract, so neither of those cases have the slightest bearing on the present. In *Clavering v. Westley* (m) there was a trust, and also insolvency, which might raise the same kind of equity as that enforced in *Powles v. Hargreaves*. (n) In *Sanders v. Benson*, (o) Lord LANGDALE expressed an * opinion opposed to * 820 our view, but the bill was dismissed on another ground, so his remark can hardly be considered more than a *dictum*, while *Walters v. Northern Coal Mining Company*, which is the last authority on the subject, is almost on all-fours with the present case. In both *Close v. Wilberforce* (k) and *Jenkins v. Portman*, (p) it is said that possession is not more material in equity than at law. Now, at law, it goes for nothing: it is not needed to create a liability to the landlord in the case of an assignment, and it is insufficient to create any in the case of an underlease. The allegation as to fraud is nothing: a leaseholder may assign to a

(a) 3 Bro. C. C. 166; 1 Ves. Jr. 235; 8 Sim. 499.

(b) 7 Sim. 149.

(c) 8 Sim. 508.

(d) 2 De G. & Sm. 304; 2 Phill. 717.

(e) 1 Y. & C. C. C. 7.

(g) 2 Y. & C. C. C. 4.

(h) 5 De G., M. & G. 629.

(i) 1 Keen, 435.

(k) 1 Beav. 112.

(l) 3 Beav. 373.

(m) 3 Peere Wms. 402.

(n) 3 De G., M. & G. 430.

(o) 4 Beav. 350.

(p) 1 Keen, 435, 454.

pauper: *Taylor v. Shum*; (a) and an agreement to assign is an act of which the landlord cannot possibly complain.

Mr. Roundell Palmer and *Mr. Hislop Clarke*, in support of the bill. —The decision of the Master of the Rolls is not inconsistent with any of the authorities, and cannot be reversed without overruling at least two of them. We do not rely on *Lucas v. Comerford*, (b) but, to say the least, it does not make against us. *Flight v. Bentley* (c) is, no doubt, overruled by *Moore v. Choat*; (d) but those were cases of mere equitable mortgage by deposit of a lease, and the Vice-Chancellor, in *Moore v. Choat*, expressly refers to the fact that possession had not been taken. Moreover, a mortgage and an absolute assignment stand on a very different footing. *Robinson v. Rosher* (e) and *Arkwright v. Colt* (g) similarly leave untouched the case of an equitable assignment followed by possession under it. *Moore v. Greg* (h) only decided that a land-
 * 821 lord had no * right to compel an equitable assignee to make himself a legal assignee, and there is no difficulty about that case, for a person not party or privy to a contract can have no right to compel specific performance of it. These are all the cases that relate to an equitable assignee of a lease. *Walters v. The Northern Coal Mining Company* (i) is a case of quite a different class. In that case there was an equitable title co-existent and consistent all along with the legal title, and an assignment would have been inconsistent with the nature of the contract, and so would the equitable relief which was sought. *Clavering v. Westley* (k) was similar in its circumstances, and the overruling it in *Walters v. The Northern Coal Mining Company* decides nothing against us. None, therefore, of the authorities are against us. *Close v. Wilberforce* (l) lays down the law expressly as we contend, and *Sanders v. Benson* (m) is equally in our favour. Now, looking at the case on principle, we say that an equitable assignment, accompanied by possession, creates the relation of landlord and tenant. The equi-

(a) 1 Bos. & Pul. 21.

(b) 3 Bro. C. C. 166; 1 Ves. Jr. 235; 8 Sim. 499.

(c) 7 Sim. 149.

(d) 8 Sim. 508.

(e) 1 Y. & C. C. C. 7.

(g) 2 Y. & C. C. C. 4.

(h) 2 De G. & Sm. 304; 2 Phill. 717.

(i) 5 De G., M. & G. 629.

(k) 3 Peere Wms. 402.

(l) 1 Beav. 112.

(m) 4 Beav. 350.

table assignment alone is, as regards the landlord, nothing, for it does not in any way bring the assignee into contact with him; but when possession is taken a person comes in whom the landlord, if he acquiesces in the taking possession, cannot treat as a stranger, and the assignment thus becomes perfected. Again, whoever takes the land with notice of the covenants is bound by them. *Tulk v. Moxhay*. (a)

[THE LORD JUSTICE KNIGHT BRUCE. — Would not a merely prohibitory covenant, like that in *Tulk v. Moxhay*, have been enforced against an under-lessee who had notice of it?]

Mr. Lloyd, in reply.

Judgment reserved.

March 27.

* THE LORD JUSTICE KNIGHT BRUCE. — The substantial * 822 question upon this appeal is whether an equitable assignee of a legal term of years granted in mines, or mines and other hereditaments, under a reserved rent and certain covenants, is liable to be sued in equity by the lessor for rent which became due and damages in respect of breaches of some of the covenants committed during the time that the assignee was in the possession and enjoyment of the demised property as the equitable assignee of it, which he has now ceased to be. There is not any special or any other special circumstance in the case that is in my view material. It was properly conceded, on the part of the respondents, that the liability would not have existed but for the possession or enjoyment of the property under the equitable assignment. It appears, however, to me, I acknowledge, that the possession and enjoyment make no difference. They do not, in my opinion, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter. The possession by itself would not, nor would the equitable assignment by itself, have given the respondents the equitable right which they are here asserting against the appellants; neither, I think, can the union of the two. The legal right, if any, that the respondents have against the appellants

ought, I conceive, if asserted in any Court, to be so in a Court of Law. The absence of that legal right cannot, in such a case as the present, confer, in my opinion, an equitable right to what the bill asks against them. The demurrers seem to me sustainable, but I am not for giving any costs of the suit.

* 823 The Lord Justice TURNER, after shortly stating the * allegations and the prayer of the bill, proceeded as follows: In determining the case I think that no weight can be given to the allegation that the agreement, sale, and assignment mentioned in the bill were frauds upon the plaintiffs. These were acts authorized by the law, and not in themselves fraudulent, and no circumstances are stated which can affect them with the character of fraud. That allegation, therefore, may be laid out of the case. The other allegations of the bill in substance amount to no more than this, that the demurring defendants have agreed to take and purchase interests in the colliery and other property demised by the lease, and that they have been in possession under the lease, and have treated themselves as assignees of it and entitled to its benefits. The question raised by the demurrers is whether, under these circumstances, these defendants became liable in equity to the plaintiffs for the rent reserved by the lease and upon the covenants contained in it.

Looking at this question upon principle and without reference to the decided cases, I confess myself unable to discover any ground upon which these defendants can be subjected in equity to the liability which this bill seeks to impose upon them. If, as observed by my learned brother, these defendants are at law liable to the plaintiffs, the plaintiffs may pursue their legal remedies. The bill states no impediment to the pursuit of them, no obstruction for the removal of which the interference of this Court can be required. If, on the other hand, these defendants are not at law liable to the plaintiffs, what are the grounds alleged by this bill upon which they are in equity to be made liable? Simply that they have contracted to purchase interests in the lease and have been in possession. The contracts to purchase, however,

* 824 are not contracts with the plaintiffs, and * there is nothing in the bill to show that the plaintiffs are in any manner entitled to the benefit of those contracts, and if the defendants are liable by virtue of their possession, the liability, as I

apprehend, is to be enforced at law and not in equity. Courts of Equity do not, as I think, in ordinary cases, decree the payment of rent or the performance of covenants upon a mere agreement for a lease. In such cases the Court does not treat the relation of landlord and tenant as completed by the agreement, and decree the rent to be paid and the covenants to be performed accordingly, but it decrees the execution of the lease, and leaves the parties to their remedies at law consequent upon the relation created by the execution of it. To take, however, a case more near to the present, suppose, in the case of an agreement for a lease, the intended lessee has assigned the benefit of the contract, can this Court, at the instance of the intended lessor, enforce the payment of the rent or the performance of the covenants by the assignee of the contract? I take it most clearly not; for there is no privity of contract between the lessor and the assignee; but if this cannot be done where there is a mere contract for a lease, upon what principle is it to be done where there is an actual lease, and the lessee has agreed to assign?

These considerations seem to me to prove, if proof be wanted, that the relation of landlord and tenant is a legal and not an equitable relation, and this view of the case seems to me to introduce another and not unimportant consideration. Where persons enter into contracts, they must surely be assumed to contract with reference to the rights and liabilities incident to the subject-matter of the contract. Must not these defendants, therefore, when they agreed to take and purchase interests in this lease, be taken to have understood * that, as between them and the land- * 825 lord, they would not become liable until the lease was assigned to them? Can this Court extend and alter their contract, and hold them to be so liable before the assignment is made? Upon these grounds I think that, upon principle, this bill cannot be maintained.

It remains then to consider whether there is such a weight of authority in favour of the bill as renders it incumbent upon us to support it. I am of opinion that there is not. I think it unnecessary to consider the cases anterior to the decision in *Moore v. Choat*, (a) for, so long as it was held that an equitable assignee of a lease by way of mortgage was liable in equity to the landlord

for the rent and upon the covenants, it could not of course be held that an equitable assignee of the lease, otherwise than by way of mortgage, was not so liable, the case of the equitable mortgagee being of course entitled to the more favourable consideration. So long, therefore, as the Court was governed by the cases of *Lucas v. Comerford* (a) and *Flight v. Bentley*, (b) it might well be that the decision in a case like the present should be in favour of the landlord. But the cases of *Lucas v. Comerford* and *Flight v. Bentley* were overruled, or at all events their authority was displaced by the case of *Moore v. Choat*, and all the subsequent cases have followed that decision with the single exception of *Saunders v. Benson*, (c) and in that case the bill was dismissed on a different ground, so that the case has no authority beyond the weight which is justly due to the dicta which it contains. In the argument on the part of the plaintiffs it was said that these subsequent cases were cases of equitable mortgagees with the exception

* 826 of * *Walters v. The Northern Coal Mining Company*, (d) which it was attempted to distinguish. It is impossible however to misunderstand the judgment of the Lord Chancellor in that case, and it cannot, I think, be substantially distinguished from the case before us, and, as to the other cases being cases of equitable mortgagees, it does not seem to me that the distinction attempted to be drawn between the case of an equitable mortgagee and of an equitable assignee otherwise than by way of mortgage, is well founded, for although the cases are different, the difference consists not in the relation of the lessor to the assignee, but in the relation of the assignor to the assignee. The difference is, that in the one case the assignee may be bound to indemnify the assignor, in the other not, and this difference being one which does not affect the relation between the lessor and the assignee, I do not see why the cases as to equitable mortgagees do not apply to cases like the present. My opinion, therefore, is, that both upon principle and authority these demurrers ought to be allowed, but I think they should be allowed without costs.

(a) 3 Bro. C. C. 166.

(b) 7 Sim. 149.

(c) 4 Beav. 350.

(d) 5 De G., M. & G. 629.

* FORSHAW v. HIGGINSON.

* 827

1857. March 21. Before the LORDS JUSTICES.

Where there was a reasonable ground for contending that a legacy was a charge upon an estate vested in trustees for sale, and they, in the exercise of a *bond fide* discretion, for the purpose of satisfying a purchaser who refused to complete unless the legacy was discharged, paid it: *Held*, that whether the objection would have been tenable or not, the payment ought to be allowed to the trustees as between them and the persons beneficially interested.¹

THIS was a motion by way of appeal from a decision of the Master of the Rolls, disallowing to trustees in passing their accounts a sum of 558*l.* paid by them in discharge of an alleged incumbrance on an estate sold by them.

John Higginson, a former owner of the estate, by his will dated the 8th of July, 1838, directed his debts and funeral and testamentary expenses to be paid, and then, after some devises and bequests to different persons, gave directions as to settling the affairs of the partnerships in which he was engaged; and he authorized his executors or any of them to sell and dispose of his real and personal estate not specifically devised and bequeathed, and he directed the proceeds of the sale to be invested to answer the purposes of his will, and empowered his executors to give receipts for the purchase-moneys. He then gave an annuity to his wife Sarah Ann Higginson, and a legacy of 50*l.* to each of his sisters, and gave to his godson George Barton Irlam 500*l.*, and gave 5000*l.* to each of his own children living at his death, and charged all his estate with the payment of the annuity to his wife and the legacies to his sisters and children, not here mentioning the legacy to G. B. Irlam. And he then gave all the residue of his real and personal estate to such of his sons as should survive him when and as they should respectively attain twenty-one. The testator appointed his wife to be an executrix during her widowhood, and joined with her in the executorship his sons Jonathan Higginson and Haynes Burrow Higginson and Richard Deane and George Barton Irlam.

¹ See *Lewin Trusts* (5th Eng. ed.), 323, 415, 424; *Ward v. Ward*, 2 H. L. Cas. 784; *Darke v. Williamson*, 25 Beav. 622; *Perry Trusts*, § 476; *Hutton v. Weems*, 12 Gill. & J. 83.

* 828 * The testator died in December, 1834, leaving his widow and six sons and two daughters surviving him. Jonathan Higginson alone proved the will in England. The will was also proved in the West Indies.

The testator at his death carried on business as a merchant both at Liverpool and Barbadoes, in copartnership with Jonathan Higginson and Richard Deane, and the business after his death was conducted by the surviving partners. Jonathan Higginson, as executor, discharged the testator's legacies and debts, except the sum of 500*l.* given to George Barton Irlam, of the payment of which there was no evidence. G. B. Irlam died in January, 1840, intestate.

On the 13th of November, 1847, Messrs. Higginson and Deane became bankrupts. The assignees under the bankruptcy filed a bill against the parties interested under the will, alleging that Jonathan Higginson had made, out of the assets of the firm, payments for the benefit of the testator's estate, to an amount greater than the value of the testator's share in the partnership, and seeking to stand as creditors for that amount against the estate, and also to recover Jonathan Higginson's share in the estate. A second suit was also instituted for the administration of the testator's estate by Frederick Weeks Higginson, another of the testator's sons.

On the 21st of June, 1850, a deed of arrangement was entered into between the several members of the family and the assignees under the bankruptcy for the purpose of putting an end to the suits, to which deed George Barton Irlam's representative was not a party. By this deed it was agreed that the claims of the assignees should be fixed at a certain amount therein mentioned;

* 829 and the whole of the testator's residuary * real estate in England was conveyed to Henry Forshaw and James Forshaw upon trust to sell the same "with power to buy in the said premises, or any part or parts thereof, at any sale or sales by auction, and to rescind, abandon, or vary any contract for sale, and to resell the premises that shall be so bought in, or the contract for the sale of which shall be so rescinded or abandoned as aforesaid, without being in any wise answerable for any loss which may happen thereby respectively, and also with full power to insert any such special or other clauses or stipulations in any contract for or conditions of sale, as the said trustees or trustee shall think fit,

and do and shall enter into all such other arrangements as the said trustees or trustee shall, in their or his discretion, think fit, in relation to any sale or sales of the said premises or any part thereof." The trusts declared of the purchase-moneys were to pay the expenses of sale, the costs of the legal proceedings, the debts and annuities which should be established against the estate of the testator to the satisfaction of the trustees, then to pay the agreed amounts to the assignees and certain definite sums to the parties claiming under the will, and to divide the residue in manner provided by the deed. Among other clauses for the indemnity of the trustees was a clause providing that it should not be incumbent on the trustees or trustee to take steps to enforce any of the covenants in the deed, unless they or he should in their or his discretion think fit to do so, and that no laches or responsibility should be imputable to or should attach upon them or him for any act or deed whatsoever which should be done, executed or directed by them or him in the execution and exercise of the trusts, powers, and authorities of the deed, or for omitting to exercise and carry into execution the same trusts, powers, and authorities or any of them.

* Messrs. H. and J. Forshaw, in pursuance of the trusts of * 830 this deed, sold various estates of the testator, among these was an estate called Stadmorston, which they agreed to sell for 14,000*l*. One of the purchaser's requisitions was that evidence should be furnished of the payment of the legacy to George Barton Irlam. The trustees were desirous to complete the sale, thinking it a very advantageous one. They were advised by counsel that the legacy to George Barton Irlam constituted a charge upon the real estate; they were unable to prove that it had been paid, and the representatives of the legatee made a claim for it. The trustees accordingly paid a sum of 558*l*. for the legacy and interest in July, 1853, to the personal representatives of George Barton Irlam, and the sale was completed.

The present suit was instituted by James Forshaw, to be relieved from the trusts. In taking the accounts under the decree, the question arose whether the above payment ought to be allowed. The Master of the Rolls decided that the payment must be disallowed, for that the trustees had paid it to get rid of an objection which the purchaser could not have sustained, inasmuch as the gift

of the legacies was overridden by the charge of debts in the will. The plaintiff appealed.

Mr. Roundell Palmer and *Mr. Bary*, for the appellant. — The legacy was well charged on the real estate, and the purchaser could have sustained his requisition. *Bench v. Biles*, (a) *Mirehouse v. Scaife*. (b) The charge of debts does not affect the case, as the trustees of the will are not the vendors. At all events the case was one of great doubt, and the trustees
 * 831 having made the payment ** bona fide*, after taking proper advice and in order to secure the completion of a very advantageous sale, ought to be allowed it, even if the power to enter into arrangements did not give them express authority to do so, which we submit it did.

Mr. Dickinson, for the other trustee.

Mr. Walker, for the assignees. — We have, by the conduct of the trustees, been deprived of an opportunity of contesting the liability of the estate to this legacy, and that without our being consulted. We contend that, on the fair construction of the will, it was not charged on the real estate, and if it was, the lapse of time and the fact that the large legacies were paid soon after the testator's death raise a strong presumption that it had been paid. The payment is not conformable to the deed, which was not to carry into effect the trusts of the will, but an arrangement between the parties, which did not provide for such a payment; nor does the power to enter into arrangements authorize it. The payment was made by the trustees in their own wrong, and has rightly been disallowed.

Mr. Selwyn and *Mr. Charles Hall*, for other parties in the same interest.

Mr. Palmer, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, real estates were conveyed to trustees upon trust to apply the proceeds of their

(a) 4 Madd. 187.

(b) 2 M. & C. 695, 07

sale for various specific purposes. They made a contract for the sale of one of the estates at a very good price, and the transaction was believed to be altogether advantageous to the * trust. An abstract of their title was in due course delivered to the purchaser. On that abstract it appeared that a former owner had given by his will a legacy of 500*l*. The purchaser, as an objection of title or conveyance, or both, objected that it was charged on the real estate; that there was no evidence of discharge or satisfaction; and that, as the original trustees were not selling, the new trustees, notwithstanding the charge of debts in the will, could not give a good discharge for the purchase-money until this legacy should have been paid. This objection was of a serious character: it was at least reasonably arguable that the will made the legacy a charge upon the real estate; there was no proof of payment: it was at least reasonably arguable that the whole legacy was due: it was at least reasonably arguable that without payment of it no effectual discharge could be given to the purchaser. The trustees acted *bonâ fide*; they were advised by competent solicitors: and it was thought the advisable course to pay this legacy, which there was such reasonable ground for contending must be paid, out of the proceeds of the sale. They did so in the exercise of a reasonable and honest discretion, acting under good professional advice; and it is impossible, on the materials before us, to say that a prudent, honest, and well-advised man might not have taken that course. The payment must be allowed to the trustees, and they must have their costs as between solicitor and client, both at the Rolls and here, out of the estate; but no costs of the present appeal ought, in my judgment, to be allowed to any of the other parties.

THE LORD JUSTICE TURNER. — The legatee George Barton Irlam derived his title under the will of John Higginson, who died in the year 1834. The testator's estate was in considerable entanglement: * one of the executors was a partner with * 883 other persons, and he made payments out of the partnership assets on account of the estate of the testator, who had been one of the partners. The firm having become bankrupt, suits were instituted, one by the assignees in bankruptcy, and another by one of the testator's legatees, to administer his estate. A deed of compromise was executed, to which all the legatees, except George

Barton Irlam, were made parties, and the estates were vested in Messrs. Forshaw upon trust to sell and make certain payments provided for by the deed. The trustees proceeded to sell under the deed, and the purchaser objected that proof must be given of the payment of George Barton Irlam's legacy. No such proof could be given; and in order to remove the objection and to complete the sale, the trustees paid the legacy. It is now contended that this payment ought not to be allowed them in passing their accounts.

It was urged against the allowance, that the legacy was not charged on the real estate, and therefore that the payment of it by the trustees was improper. I give no opinion on the question, whether the legacy was or was not charged on the real estate. The inclination of my opinion is, that it was; but it is impossible to read the will without seeing that the question is open to much doubt. The question then being one of doubt, were the trustees to sell subject to this doubt? As regards the powers given by the deed, the authority to enter into arrangements is no doubt connected with the power to sell, subject to special conditions; and it is doubtful whether that authority would warrant the trustees in paying off an alleged charge of this nature; but, looking at the character of the property and the nature of the title, I am inclined to think it would. In my opinion, however, it

* 834 is unnecessary to decide that point. * The true question in this case, as I think, is, whether the trustees, having acted *bond fide* in the best exercise of their discretion in making this payment, ought not to be allowed it. The case of *Blue v. Marshall* (a) has, I think, an important bearing on that point. In that case, a trustee had released certain arrears of rent due to the trust estate, and the very argument which has just been urged was urged there also,—“that whenever an executor, administrator, guardian, or trustee will of his own accord release a debt, this being his voluntary act, he shall answer for it.” But Lord TALBOT said, that the trustee seemed to have done nothing but what was prudent, and that the release of the arrears seemed to be for the benefit of the testator's estate, and he would not allow the trustee to be personally charged with the arrears of rent. Upon the authority of that case, and of several other cases, I have always

understood the law of this Court to be, that where trustees are acting *bond fide* in the exercise of their discretion, they may (though they incur some risk in doing so) make payments which are in their judgment necessary for the due execution of the trusts, and that such payments ought to be allowed them. The reason why such cases seldom come before the Court no doubt is, that trustees are generally advised to apply for directions to this Court before making such payments, inasmuch as if they make them of their own authority they are liable to have their conduct called in question after they have lost the evidence showing that they have acted in the *bond fide* exercise of their discretion. This being my view of the case, I agree with my learned brother that the trustees must have this sum allowed them and their costs throughout as between solicitor and client, and I agree also that nothing ought to be said as to the costs of the other parties.

* EVANS v. COVENTRY.

* 835

1857. March 19, 20, 24, 27. Before the LORDS JUSTICES.

In a suit for winding-up the affairs of a mutual company, which was formed for the purposes, among others, of insuring the payment of sums of money during the sickness and on the death of its members, and of receiving deposits at interest, and the rules of which as well as the terms of its policies provided that the funds of the society should alone be answerable for the claims of insurers, a decree was made which, among other things, declared that the insurers had a charge on so much of the capital and funds as was attributable to the insurance branch; and the decree contained directions for the valuation of immature assurances.

On appeal the decree was varied, and, as varied, declared that the capital and funds ought to be applied to answer the claims of the insurers and depositors. But it was not disturbed as to the direction for valuation. Form of decree in such a case.

THIS was an appeal by the plaintiffs seeking to have certain variations made in a decree of Vice-Chancellor KINDERSLEY.

The bill was filed by eleven persons "on behalf of themselves and all other the persons insured in the capital or joint stock and property of the company or society called the General Benefit

Life Assurance and Loan Society," against the directors, and the secretary who was out of the jurisdiction, and it prayed for an account of the property of the company, for a declaration that the plaintiffs and all others insured had a charge on the capital of the company, and that it might be applied to answer their claims; that the defendants might be declared personally liable for losses alleged to have occurred through their default, especially by reason of improper payments of dividends and the defalcations of the secretary, and that the defendants might be declared liable to pay what remained unpaid in respect of their shares.

The company was formed in the year 1820, for the purpose of granting insurances of two descriptions; viz., insurances of sums payable on death, and insurances to secure weekly or monthly sums of money during sickness, and also for the purpose of granting deferred annuities. It appeared also that a loan society * 836 and deposit * bank was established, as to which there was much conflict of evidence whether it was a distinct society or not, but it was ultimately established that it was only a branch of the above company. Some of the depositors were made defendants.

The company was constituted by a deed of settlement in July, 1820, with a capital of 50,000*l.*, divided into 1000 shares of 50*l.* each; 2*l.* 10*s.* was to be paid on each share within a short limited time, and the rest was to be paid by calls to be made as mentioned in the deed. The management of the concern was vested in the directors, subject to the directions of general meetings of the body of shareholders. The following clauses of the deed were principally referred to in argument.

"34. That the court of directors shall require from the secretary, inferior clerks, and servants such security for their good conduct while in the service of the company, and allow them out of the funds or property of the company such salaries or wages, as they shall think proper.

"108. That the funds or property of the company for the time being remaining unapplied and undisposed of and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities contained in these presents shall alone be answerable for the claims and demands of persons insuring with the company and the annuity creditors; and the directors signing the policies and the instruments securing the annuities shall be personally liable to the persons to whom the policies shall be given or

annuities granted for the application of the said funds or property in discharge of the money secured by the said policies and of the said annuities, but not further or otherwise, and that neither in respect * to the persons claiming under the said policies * 837 nor the persons entitled to the said annuities, nor in respect to the directors who may have signed policies or instruments securing annuities, or any of their heirs, executors, or administrators, shall the proprietors of the company be answerable indirectly or directly further or otherwise than as to their respective shares not subject to prior claims or demands in the company's said capital stock of 50,000*l.*, it being the true intent and meaning of these presents that no claim upon any policy or upon any instrument securing any annuity shall be enforced against any of the directors, their heirs, executors, or administrators, to a greater extent than the funds or properties of the company at the time of recovering upon such policy or instrument securing such annuity shall be competent to reimburse them, and that the person or persons against whom any such claim shall have been enforced, or his or their executors or administrators, shall have no remedy against any proprietor of the company for reimbursement except to the extent of such proprietor's share.

" 125. That the funds or capital of the company shall consist of the capital of 50,000*l.*, of all sums to be from time to time received by the company for insurances effected by the company, for the revival of forfeited policies, for annuities granted by the company, and for such shares as shall from time to time be forfeited and sold for the benefit of the company, and of all sums (besides any part or parts of the capital of 50,000*l.*) as shall from time to time be recovered in any actions or suit that may be prosecuted against any person or persons breaking or refusing to perform or comply with any of the covenants, conditions, and stipulations contained in this deed of settlement, and which on his, her, or their part ought to be performed and complied with, or against * the * 838 heirs, executors, or administrators of such person or persons, and of the interest, dividends, and annual produce and accumulations of so much of the said capital of 50,000*l.*, and of so much of the sums to be received and recovered from time to time as aforesaid, as shall from time to time be actually in the hands of the company and remain unapplied and undisposed of after answering the claims which persons insured and annuitants

shall from time to time have on the company, and the expenses attending the purchase and support of the house, and the various other claims upon and expenses of the said company, and also of the stocks, securities, house, and other property in or upon which, in pursuance of the powers, authorities, and directions herein contained, the said sums, interest, dividends, annual produce, and accumulations, or any part thereof respectively, shall be laid out and invested."

The company carried on business for about thirty-four years, and during that time effected a large number of insurances and granted some annuities. The policies contained the proviso, "that the capital, stocks, or funds of the said company for the time being remaining unapplied and undisposed of in pursuance of the trusts, powers, and authorities contained in the deed of settlement shall alone be answerable to the demands of the said insured, or the heirs, executors, administrators, or assigns of the said insured under this policy, and that the members of the said company shall not nor shall any of them be answerable, directly or indirectly, further or otherwise than as to their respective shares in the sum of 50,000*l.*, constituting the original capital, stock, or funds of the said company set opposite their respective signatures to the deed of settlement, or mentioned in some other deed referring thereto."

* 839 * It appeared that the company proceeded upon wrongly calculated tables, and that its affairs consequently were never in such a state as to justify the directors in declaring a dividend: they, however, for a series of years went on declaring and paying dividends of 5*l.* per cent. They also passed a resolution, not authorized by the deed of settlement, increasing the payments to the directors for their services.

The deed of settlement contained no authority to the directors under any circumstances to apply the funds of the company in buying up shares of the company. They, however, bought up with the moneys of the company, the shares of a number of the shareholders. This appeared to have been done in order that the shares might not get into the market, which was thought likely in the circumstances of the case to damage the reputation of the company.

In the year 1854, John Brydie, the secretary, absconded, having in his possession, as was alleged, several thousands of pounds. The directors thereupon suspended the operations of the company, both

as regarded receipts and payments, it being clear that the company was insolvent and could not go on.

The prospectuses issued by the directors stated the capital to be 50,000*l.*, but it did not appear that they had ever made any representations that the whole of the shares had been taken or the whole capital paid up.

The case will be found reported *ante*, Vol. V. p. 911, on an application for an injunction and receiver.

The cause was heard before Vice-Chancellor KINDERSLEY, * who delivered an elaborate judgment. His Honor held, * 840 that the policy-holders were entitled to receive out of the funds of the society either a return of all that they had paid or the value of their interest in the policy, and that having regard to the nature of the insurances the insurers ought to receive the value of their respective policies at the time when the society stopped payment. With respect to the nature of the contract which each shareholder must be considered as having made, his Honor held that the insured were entitled to have the funds of the society made up by the shareholders to the extent of the unpaid calls on their respective shares, and by the directors to the extent to which the funds of the company had been diminished by their unauthorized acts, but that the statement as to the capital being 50,000*l.* was not a representation calculated to induce a belief that all the shares had been taken or the whole capital paid up, and that the directors were, therefore, not liable to make good the funds to that amount on the footing of misrepresentation; that there was no such conflict of interest between the different classes of insured, those who had insured for a gross sum payable on death, and those who had insured for sums payable periodically during sickness, as to prevent the plaintiffs from effectually representing the whole body of the insured, and that the suit was, therefore, rightly constituted as regarded plaintiffs; that although all the shareholders ought to have been before the Court, yet that, having regard to the great difficulty of finding them, and to the fact that the defendants were unable to give any effectual assistance in finding them, a decree ought to be made against those who were before the Court, to the extent as against each of his unpaid share of the capital; that the purchases of shares with the funds of the company were breaches of duty, and that the directors must replace the moneys thus * expended; and that the directors were not liable for * 841

Bryden's defalcations on the ground of their omitting to take security from him for his good behaviour, for that it was not imperative on them to require security, and that in not doing so they did not appear to have acted with a view to their own private advantage, or from any other improper motive. (a) His Honor reserved the question of costs, and made a decree dated the 15th of April, 1856, which will be found below.

The plaintiffs appealed from this decree, as being in some points not sufficiently favourable to them.

Mr. Anderson and *Mr G. W. Collins*, for the plaintiffs, in support of the appeal. — We say that the decree should be varied in our favour on the following points: 1. The directors ought to be declared liable for the defaults of Brydie. 2. They ought to be declared liable to make up the capital to 50,000*l.* 3. They ought to be ordered to pay interest on their extra allowances, on the dividends which they wrongfully paid, and on the moneys which they applied in the purchase of shares. 4. They ought to be ordered to pay costs.

As to Brydie's defalcations, it was the duty of the directors under the 34th clause to take security for his good behaviour, and their omission to do so after his two predecessors had been found defaulters showed a degree of culpable negligence for which they must be held responsible.

The statement that the capital was 50,000*l.* was extensively circulated among the class who were likely to become insured in such an institution. It was a representation that there was 50,000*l.* of capital available as a security to the insured, and the directors must make the representation good. *Stainbank v. Fernley*, (b) *Burnes v. Pennell*, (c) *Pulsford v. Richards*. (d)

The directors are in the position of defaulting trustees, and it is a matter of course to make a trustee replace with interest moneys which have been lost by his breach of trust, and the decree, therefore, we submit, is erroneous in not making the directors pay interest. The case is one of gross neglect and default, and they ought to pay costs up to the hearing.

Mr. Regnier Moore, for the depositors who were defendants.

(a) See the judgment reported at length, 25 Law J. (N. S.) Ch. 491.

(b) 9 Sim. 556.

(c) 2 H. L. Cas. 497.

(d) 17 Beav. 87.

Mr. Mouatt, one of the directors, appeared in person.

Mr. Glasse and *Mr. Elderton*, for Norcutt, another of the directors who had been examined as a witness on behalf of the plaintiffs. — There cannot be any decree against a defendant whom the plaintiff has examined. *Bernall v. Lord Donegal*, (a) *Attorney-General v. Dew*, (b) *Rowland v. Witherden*, (c) *Stokes v. Trumper*, (d) *Monday v. Guyer*, (e) *Richmond's Executor's Case*, (g) *Daniell v. Daniell*, (h) *Carrington v. Pell*, (i) *Wood v. Rowcliffe*, (k) *Forbes v. Forbes*, (l) *Harford v. Rees*, (m) * *Nightingale v. Dodd*. (n) * 843

The constitution of this society is such that relief cannot be given: *Clough v. Ratcliffe*, (o) *Beaumont v. Meredith*; (p) for all the members ought to be parties.

Mr. Anderson, in reply.

Their Lordships did not deliver any formal judgment, but settled the minutes of an order varying the decree of the Vice-Chancellor in various particulars. These minutes were spoken to in Court, and finally settled on the 27th of March. The reporters think it the most convenient plan to give the original decree, and the decree as varied on appeal, in parallel columns.

ORIGINAL DECREE.

Declare that the plaintiffs, and all other the persons insured in the capital or joint stock of the company or society in the amended bill mentioned, have a charge upon so much of the capital or joint stock; funds, securities, investments, and property of the said company or society as belongs or is attributable to the insurance branch of the said company, and that the same is liable to answer the claims of the plaintiffs and all other the persons insured in the said company.

DECREE AS VARIED ON APPEAL.

Declare that the capital or joint stock, funds, securities, investments, and property of the company or society in the amended bill mentioned, ought to be applied to answer the claims of the plaintiffs and all other the persons insured in, or depositors with, the said company or society.

- (a) 3 Dow. 133.
- (b) 3 De G. & Sm. 488.
- (c) 3 Mac. & G. 568.
- (d) 2 K. & J. 282.
- (e) 1 De G. & Sm. 182.
- (g) 3 De G. & Sm. 96.
- (h) *Ibid.* 340.

- (i) *Ibid.* 512.
- (k) 6 Hare, 183.
- (l) 9 Hare, 461.
- (m) 9 Hare, App. lxx.
- (n) 2 Ambl. 583.
- (o) 1 De G. & Sm. 164.
- (p) 3 Ves. & B. 182.

ORIGINAL DECREE.

1. Decree an account of the capital or joint stock, moneys, funds and property of the said company or society which have come to the hands of the defendants Coventry, Buxton, * 844 Mouat, * Biddell, and Norcutt, or any of them, or to the hands of any other persons or person by their or any of their order or for their or any of their use, distinguishing such parts thereof as consist of deposits made by depositors in the loan or deposit branch of the said company or society.

2. Order an account of the debts and liabilities of the said company or society when it closed business and at the present time.

Declare that defendant Seaman is not liable as a director, trustee, or officer of the said company or society, and declare that defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable as directors of the said company or society from and after the respective times they were elected to the office of director or first acted as directors.

3. Order an inquiry at what times the last-named defendants were elected to the office of director or first acted as directors.

Declare that the resolution of the board of directors of the 30th day of October, 1840, for increasing the remuneration of the directors from the sum of 5s. each to the sum of 10s., each for each attendance at the board of directors was inconsistent with the deed of settlement in the amended bill mentioned, and that defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable to answer and * 845 make good to the funds of the said company or society what beyond the sum of 5s. each for each attendance shall from

DECREE AS VARIED ON APPEAL.

1. Decree an account of the capital or joint stock, moneys, funds, and property of the said company or society which have come to the hands of the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt or any of them, or to the hands of any other persons or person by their or any of their order, or for their or any of their use.

2. Order an account of the debts and liabilities of the said company or society when it closed business, and at the present time.

Declare that defendant Seaman is not liable as a director, trustee, or officer of the said company or society, and declare that defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable as directors of the said company or society from and after the respective times following (that is to say), the defendant Coventry from and after, &c.

Declare that the resolution of the board of directors of the 30th day of October, 1840, for increasing the remuneration of the directors from the sum of 5s. each to the sum of 10s. each for each attendance at the board of directors, was inconsistent with the deed of settlement in the amended bill mentioned, and that the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable to answer and make good to the funds of the said company or society what beyond the sum of 5s. for each attendance shall from time to time have been

ORIGINAL DECREE.

time to time have been paid in pursuance thereof from the respective times they were elected to the office of director or first acted as directors.

4. Order an account of all moneys so paid exceeding the sum of 5s. each for each attendance at the board of directors.

Declare that the respective declarations of dividends from time to time made out of the funds of the said company or society were breaches of trust, and that defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable to answer and make good to the funds of the said company or society what shall from time to time have been paid in pursuance thereof from the respective times they were elected to the office of director or first acted as directors.

5. Order an account of all moneys so paid.

* Declare that the purchases of shares in the capital or joint stock of the said company or society from time to time made by the directors on behalf of the company were breaches of trust, and that such of the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt as authorized or concurred therein are respectively liable to make good to the funds of the said company or society what since the time when they were elected directors, or first acted as directors

DECREE AS VARIED ON APPEAL.

paid to them respectively in pursuance thereof from the respective times aforesaid, and interest thereon after the rate of 4l. per cent per annum.

And it is ordered that an account be taken of all moneys so paid exceeding the sum of 5s. each for each attendance at the board of directors, and interest thereon after the rate aforesaid.

Declare that the respective declarations of dividends from time to time made out of the funds of the said company or society were breaches of trust, and that the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt are respectively liable to answer and make good to the funds of the said company or society what shall from time to time have been paid in pursuance thereof from the respective times aforesaid, together with interest thereon after the rate of 4l. per cent per annum, without prejudice to any right which the said defendants or any of them may have against the other shareholders of the said company or society who may have received dividends.

4. And it is ordered that an account be taken of all moneys so paid and interest thereon after the rate aforesaid.

Declare that the purchases of shares in the capital or joint stock of the said company or society from time to time made by the directors on behalf of the company were breaches of trust, and that such of the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt as concurred in such purchases are respectively liable to answer and make good to the funds of the said company what in respect of such purchases shall from time to time have been paid out of the funds of the said company or

ORIGINAL DECREE.

shall from time to time have been paid out of the funds of the said company or society in pursuance thereof.

6. Order an account of all moneys so paid.

Declare that such of the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt respectively as authorized or concurred in such purchases of shares must, as between the insured and the said company or society, be deemed and taken to be proprietors of such shares as from the respective times they were respectively elected to the office of director or first acted as director, and liable to contribute to the funds of the said company or society what remains unpaid in respect of such shares.

7. Direct an inquiry what shares have been so purchased and what remains unpaid in respect thereof, and when any and which (if any) of the last-named defendants authorized or concurred in such purchases.

DECREE AS VARIED ON APPEAL.

society, together with interest thereon after the rate aforesaid.

Order the following inquiries:

5. An inquiry which of the said defendants concurred in such purchases respectively and on what occasions.

6. An inquiry whether any and what loss has accrued to the funds of the said company or society through the misconduct or default of defendant Brydie, and under what circumstances.

* 847 * Declare that what remains unpaid of the shares held by defendants Coventry, Buxton, Mouat, Biddell, Norcutt, and Seaman respectively constitutes part of the funds of the said company or society, and is liable to answer and make good the claims of the plaintiffs and all other persons insured in the said company or society.

Direct an inquiry what shares each of the last-named defendants holds in the said company or society, and what remains unpaid in respect thereof.

7. An inquiry what shares each of the defendants holds in the said company or society, and who are the other shareholders (if any), and in what right or in what character the shares are held by them respectively and what remains unpaid in respect thereof.

ORIGINAL DECREE.

9, 10. (Inquiry as to shares held by Seaman as executor of one Woolmer, and directions for administering Woolmer's estate if Seaman does not admit assets to answer what is unpaid in respect of such shares.)

11. Direct an inquiry what insurances were in existence on the day when the said company or society closed business, distinguishing whether for life or during sickness or for money payable at a deferred period, and what annuities were then in existence, * and whether then payable or deferred, and in whose favour, and who were then and are now entitled to the benefit of those respective insurances and annuities, and what was then the value of such insurances and annuities respectively.

Just allowances.

Further consideration adjourned.

Liberty to apply.

DECREE AS VARIED ON APPEAL.

8. An inquiry what insurances were in existence on the day when the said company or society closed business, distinguishing whether for life, or during sickness, or for money payable at a deferred period, and what annuities were then in existence, and whether then payable or deferred and in * 848 whose favour, and who were then and are now entitled to the benefit of those respective insurances and annuities, and what was then the value of such insurances and annuities respectively, and what sum or sums were or was, on the day when the said company or society closed business, due and owing by the said company or society on loans or deposits, and to whom.

Just allowances.

Directions to tax costs of plaintiffs and of the defendants the depositors up to and inclusive of the hearing; plaintiffs to pay the costs of those defendants, and the defendants Coventry, Buxton, Mouat, Biddell, and Norcutt to pay to plaintiffs both sets of costs.

The costs of plaintiffs and of defendants the depositors of and incident to the appeal, to be paid out of the fund in Court.

Further consideration adjourned, to be heard before the Vice-Chancellor.

Liberty to apply.

* 849

* *Ex parte* SANDERSON.

In the Matter of LESLIE ALEXANDER and WILLIAM BARDGETT, Bankrupts.

1856. November 15, 21. Before the LORDS JUSTICES.

A surety had paid a debt of the bankrupt after the bankruptcy, with interest down to the payment, and proved for the whole amount paid, including interest subsequent to the *fiat*, but no dividend had been declared. *Held*, by the Lord Justice KNIGHT BRUCE, confirming the decision of the commissioner, the Lord Justice TURNER doubting, that an application to reduce the proof after seven years had elapsed and after the death of the surety was too late.

THIS was an appeal from the decision of Mr. Commissioner GOULBURN, refusing an application on behalf of the assignees of the above-named bankrupts under the 183d section of the Bankrupt Law Consolidation Act, 1849, which enacts, that whenever it shall appear to the assignees or two or more creditors who have proved debts to the amount of 20*l.* and upwards that any debt proved is not justly due either in whole or in part, they may apply to the Court, and if the Court upon evidence shall be of opinion that such debt is not due either wholly or in part, the proof may be expunged wholly or in part from the proceedings.

The bankruptcy was declared under a *fiat* issued in 1838, and the proof sought to be expunged was made on the 12th of January, 1850. The deposition on which it had been admitted stated in substance that Sir Edward Macnaghten had lent 10,000*l.* to the bankrupt Leslie Alexander, and that John Alexander, the respondent's testator, had become surety for the bankrupt for the payment of that amount. That on the 9th of October, 1848 (being more than ten years after the issuing of the *fiat*), the respondent's testator paid the debt for which he had so become surety, with interest up to the time of the payment, and that the whole of this amount remained due to the surety. The proof had been admitted

for the whole of the debt and interest, but no dividend had
 * 850 been since declared. The assignees * applied to have the proof reduced, and in support of the application deposed that the proof had, through inadvertence on the part of the assign-

ees, been admitted without opposition to any part of it, and that it was not until the accounts were prepared for the purpose of declaring a dividend, which was shortly about to be done, that the mistake was discovered. Under these circumstances an order was sought to expunge so much of the proof as was for interest which had accrued since the date of the *fiat*. In opposition to the application the respondents deposed that their testator John Alexander died in 1854, and that the respondents had administered the testator's estate, calculating on the dividend which would be declared on the proof as it had been admitted.

The commissioner expressed an opinion that the proof had been correctly admitted for the amount at which it stood, and that *Ex parte Wilson*, (a) which was cited to him, was too shortly reported to be relied upon, although if it had been a case in which the commissioner could have seen the ground of the decision stated, and that the act had been much discussed, he should, he said, have been disposed to give more weight to it. As it was, he considered himself bound to construe the act so as to advance the remedy of the surety, particularly in a case where it was sought to expunge a proof after nearly eight years, when some of the parties interested in maintaining it had gone to their graves, and where the mistake (if any) was one of law.

Mr. Bacon and *Mr. De Gez*, for the assignees. — The case of *Ex parte Wilson*, (a) decides the point, *and, * 851

(a) 1 Rose, 137. The following are the material parts of the order: —

“Tuesday, August 13th, 1811.

“In the Matter of Thomas Simpson, William Taylerson, John Sanderson, and Joseph Granger, Bankrupts.

“Whereas William Wilson and John Barker, of,” &c. The order then set forth the statements of the petition, which, so far as material, were to the effect following: That the commission issued on the 11th of May, 1802. That on the 11th of November, 1803, a meeting took place between the petitioner John Barker and Mr. Thomas Leadbitter, the solicitor of William Sanderson, the father of the bankrupt John Sanderson, when the petitioner John Barker required payment of the principal sum of 700*l.*, with interest, the balance then due to the petitioners as assignees of the separate estate and effects of the said Joseph Granger upon a joint and several bond, dated the 5th day of July, 1802, and made and entered into by the said J. Sanderson and W. Sanderson to the said J. Granger for securing 1000*l.* with interest.

That the petitioner John Barker, in the beginning of October, 1809, gave

although the learned commissioner appeared to doubt the correctness of the report, the order book shows that it is quite accurate.

directions to his solicitor to commence an action against William Hodgston, the executor of William Sanderson, who had then died, for the recovery of the principal and interest due on the said bond; and that such action was immediately commenced, and was afterwards proceeded in until about the 12th of December, 1809, when William Hodgston waited upon the petitioner John Barker in order to settle the matters in dispute with him and put a stop to further proceedings in the action; and that the petitioner John Barker refused to stay such proceedings on any other terms than payment of the principal money and interest remaining due on the bond, and of the costs of the action; but that Hodgston not being able at that time, as he alleged, to pay the amount thereof, it was proposed and agreed that the same should be discharged on the 10th day of January then next, and that in the mean time no further proceedings should take place in the said action. That on the 11th day of January, 1810, Hodgston paid to the petitioners, as assignees, 960*l.* 6*s.*, being the amount of what was due upon the security of the joint and several bond in respect of the principal sum of 700*l.* and interest thereon calculated up to that day. That the said Hodgston alleged that it had been agreed by and between the petitioners and himself that he should pay to the petitioners the amount of the principal and interest due upon the said joint and several bonds; and that Hodgston should prove the amount of what he should so pay in respect of the same under the joint commission, and receive dividends thereon out of the separate estate and effects of the bankrupt John Sanderson ratably with his other separate creditors. That, under the pretence of such agreement, on the said 11th day of the said month of January, Hodgston proved the said sum of 960*l.* 6*s.* under the joint commission of bankruptcy, although the sum of 712*l.* 1*s.* 7½*d.* only was the amount of the said sum of 700*l.* and the interest thereon, calculated up to the 11th day of May, 1862, the day of the date of the commission. That the petitioners did not nor did either of them ever agree that Hodgston should prove the amount of what he should pay to the petitioners upon the bond under the joint commission, and receive dividends thereon ratably with the separate creditors of the said J. Sanderson; and that such an agreement would have been without consideration and very unreasonable, as by that means the longer the said W. Hodgston had deferred the payment of the money for which he was answerable as aforesaid, the larger sum he would be entitled to prove. That the petitioners were advised and insisted that he ought not to have been admitted a creditor under the said commission for more than the said sum of 712*l.* 1*s.* 7½*d.*, the principal and interest due on the bond at the date and suing forth of such commission; and that the said proof by the said W. Hodgston ought, therefore, to be reduced to the sum of 712*l.* 1*s.* 7½*d.*

The material part of the order itself was as follows: "Now upon hearing the said petition read and what was alleged by the counsel for the said parties, I do order that the proof made by the said W. Hodgston be reduced to the sum of 712*l.* 1*s.* 7½*d.*, and that he be paid dividends upon the same when so reduced."

* They referred also to *M' Dougall v. Paton*, (a) *Ex parte* * 852 *Houston*, (b) *Ex parte Martin*, (c) *Ex parte Soper*, (d) *Ex parte Bridger*. (e)

With respect to the mistake and the length of time since the proof was made, they read an affidavit of the solicitor for the appellants, to the effect that the debt was proved on 12th January, 1850, and that at the meeting there was a great pressure of business which prevented the official assignee or the solicitor from detecting the error in the proof, which had been consequently allowed * to pass without question or investigation, * 853 and that only one of the persons interested had died, namely, Mr. John Alexander, who left a considerable estate. It was contended, that, under these circumstances, and inasmuch as no dividend had been declared, it could not be too late to correct an obvious miscalculation.

Mr. Cairns and *Mr. Bagley*, for the respondents. — The proof was properly admitted. But even if it had not been, it ought not to be disturbed now after so many years, and when the surety was dead and could not give his account of what took place at the time of the proof being tendered, and when, as was here sworn to have been the case, his executors had administered his estate on the footing of this proof having been admitted at its proper amount.

Mr. Bacon, in reply.

Judgment reserved.

November 21.

THE LORD JUSTICE KNIGHT BRUCE. — For every present purpose I assume that had the proof before us when tendered been opposed to the extent of the interest now in dispute, the opposition would so far have been well founded, according to the law of bankruptcy, and successful, whether consistent or, as I rather incline to think, not consistent with abstract justice.

But, as I collect, the proof tendered openly and fairly was unop-

(a) 8 Taunt. 584.

(d) 2 M. & A. 55.

(b) 2 Gl. & Ja. 36.

(e) 4 Mad. 269.

(c) 2 Ro. 87.

posed, and was admitted not by surprise nor with undue haste. This was in the month of January, 1850, if not earlier. The death of Mr. John Alexander, by and for whom the proof was made, happened in January, 1854, his will bearing the date of * 854 1853. And *from the time of making the proof until a period later than January, 1856, it remained wholly undisputed and unquestioned, Mr. John Alexander having been allowed to make his will and die, and he and his executors during the whole interval to arrange his affairs and act upon the notion of the entire validity of the proof.

In such a state of circumstances, thinking the fact of a dividend on the estate proved against not having been declared before the proof was disputed immaterial, I consider that the application to the commissioner to reduce the proof came too late; that the lapse of time and the facts that I have mentioned were a sufficient foundation for the order under appeal, and that it ought not to be disturbed.

THE LORD JUSTICE TURNER. — As my learned brother agrees in opinion with the commissioner, I shall give no opinion on the case, further than that I am not quite satisfied that the decision of the learned commissioner is correct. It is a reasonable case for an appeal, and the costs of both parties will come out of the estate.

AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABSTRACT. See Costs, 2.

ACCESS TO LAND. See SPECIFIC PERFORMANCE, 1.

ACQUIESCENCE.

1. A daughter executed a deed of gift of a life-estate to her father, soon after she attained twenty-one, having no advice except that of her father's solicitor, who, however, stated that he had on that occasion acted as the solicitor of the daughter, and had informed the father that he could take no instructions from him. She afterwards consulted a different solicitor as to the validity of the deed, and corresponded with her father on the subject of the application of the rents of the property. A year afterwards she married, and negotiations took place between her father and solicitor, who acted for her intended husband and also for her, from which it appeared that she was aware of her father's interest under the deed of gift, and made no objection to it. She and her husband executed a post-nuptial settlement, which was expressed to be subject to the father's life-estate. She died more than ten years after the date of the deed of gift, and then her husband, to whom her rights devolved, filed a bill to set that deed aside: *Held*,

1. That it might have been set aside but for subsequent acts of acquiescence.

2. That there had been such acquiescence as to afford an effectual defence to the suit.

Principles on which the Court *acts in setting aside transactions * 856 between parent and child. — *Wright v. Vanderplank*, 133.

2. A client executed a mortgage to his solicitor for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solicitor undertaking to deliver the

bills by a certain time, which he did. Four years afterwards the client changed his solicitor and obtained an order for taxation of subsequent costs, but declined the offer of the solicitor to have the costs secured by the mortgage included in the taxation, and obtained the order without prejudice to any question as to those costs. Two years afterwards the client filed a bill against the solicitor, to have the latter costs investigated and the account between the parties re-opened, but did not allege any specific overcharge or error. *Held*, that the suit was precluded by length of time and acquiescence.

Seemle, that what was said in *Lawless v. Mansfield*, 1 Drew. & War. 557, does not apply to a mortgage for bills of costs. — *Blagrove v. Routh*, 620.

3. Managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease and carried on business with uniform success without any outlay beyond what the produce of the mines was more than sufficient to meet. The excluded partners continually asserted their right to participate in the profits, but took no active steps to enforce it for nine years: *Held*, that they were precluded by laches from obtaining any relief either in respect of the profits after the dissolution, or of any irregularities in the sales of the partnership effects at the dissolution.

Seemle, per Lord Justice TURNER; that the rules as to laches and acquiescence which govern cases of direct trust, and apply to property of an ordinary character, do not apply to constructive trusts affecting property like mines, subject to extraordinary contingencies and capable of being rendered productive only by a large and uncertain outlay.

That the continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be concluded.

That although it cannot be laid down, that in no case can a partner during the partnership contract for a new lease to himself exclusively of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere intimation to his partners of his intention to apply for such a lease after the dissolution is not sufficient to * exclude their interest, although the partnership is at will. — *Clegg v. Edmondson*, 785.

* 857

See FRAUDULENT DEED. MORTGAGE, 5.

ACT OF PARLIAMENT.

A special railway Act, which is repealed and in part re-enacted by a subsequent amalgamating Act, is thereby "incorporated" with the latter within the meaning of the 80th section of the Lands Clauses Consolidation Act providing for the payment of the costs in cases where moneys are deposited under the provisions of that Act or of "the special Act or any Act incorporated therewith."

Therefore, where money had been deposited under a special Act, which did not provide for the costs of obtaining payment out of Court of depos-

ited moneys, but which was re-enacted by an amalgamating Act, with which the Lands Clauses Consolidation Act was incorporated: *Held*, that the costs of payment out of Court were within the last-mentioned Act. — *Re Ellison's Estate*, 62.

ACT OF BANKRUPTCY. See BANKRUPTCY, 1.

ACTION. See SURETY, 2.

ADJUDICATION. See BANKRUPTCY, 1.

ADMINISTRATION. See MORTGAGE, 3.

AFFIDAVIT. See DOCUMENTS, 4.

AGENT.

The ordinary import of language of a letter giving full authority to deal with the property of another, ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document.

Where, therefore, a foreign merchant wrote to his English correspondent directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place and dispose of the father's money as if it was the son's own property, and stating that, as the son informed the father of every thing, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he said it himself, and must guide the consignee: *Held*, —

1. That the son was thus constituted, not merely an agent with full powers to act for his father, but that the consignee was justified in setting off, with the son's concurrence, a debt due to the father against one due from the son.
2. That, although on one or two occasions the consignee had required a written authority from the son before so acting, * neither this * 858 circumstance nor the terms of the letters rendered any writing necessary, but that a verbal direction or subsequent adoption by the son was sufficient.
3. That the circumstance of the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between the plaintiff and it, however it might be composed. — *Pariente v. Lubbock*, 5.

See CONTRIBUTORY, 1.

AGREEMENT. See FRAUDS, STATUTE OF. LEASE. SPECIFIC PERFORMANCE, 2.

ALLOWANCES. See TRUSTEES, 2.

AMALGAMATION. See ACT OF PARLIAMENT.

ANNUITY. See CUMULATIVE GIFT. LIMITATIONS. TRUSTEE, 1.

ANSWER.

The rector of a parish filed a bill to recover certain tithes and lands as belonging to the rectory. The defendants answered as to the tithes, but refused by their answer to give any discovery as to the lands. *Held*, by the Lord Justice KNIGHT BRUCE (affirming the decision of

Vice-Chancellor STUART), the Lord Justice TURNER doubting, that the defendants, having submitted to answer, could not refuse discovery as to the lands on the ground that the bill, so far as it sought relief as to the lands, was demurrable, as stating only a legal title in the plaintiff, without showing any grounds for equitable relief.

Per the Lord Justice KNIGHT BRUCE: In considering whether a defendant can, under the 38th Order of August, 1841 (consolidated Order XV., 4), protect himself from answering, the relief asked by the bill must be considered as properly asked. — *Bates v. Christ's College, Cambridge*, 726.

APOTHECARY. See BANKRUPTCY, 1.

APPEAL.

1. On an appeal of defendant from the whole decree, except as to costs, he is entitled to begin. — *Grainger v. Slingsby*, 385.

2. Respondent may be ordered to pay costs of appeal. — *Powell v. Lovegrove*, 357.

See BANKRUPTCY, 1.

APPOINTMENT. See WILL, 12.

ARBITRATION. See AWARD.

* 859 * ARMS. See WILL, 1.

ASSETS. See MORTGAGE, 3.

ASSIGNMENT. See LEASE.

ATTORNEY. See AGENT.

AUTHORITY. See AGENT. CONTRIBUTORY, 1.

AWARD.

Where a railway Act provided that the expenses of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the board of trade: *Held*, that the board of trade and commissioners of railways (who succeeded to the functions of the board) were not in the position of private arbitrators, but had a discretion which the Court could not control, and that a bill to set aside their award, on the ground of undue delegation of authority, and the admission of *ex parte* statements, could not be sustained. — *The Newry and Enniskillen Railway Company v. The Ulster Railway Company*, 487.

BANKING COMPANY. See CONTRIBUTORY, 2.

BANKRUPTCY.

1. The Court has jurisdiction on an appeal from a refusal to adjudicate to remit the matter back to the commissioner, with a declaration that, in the opinion of the Court, the evidence is sufficient to support an adjudication.

A trader was taken in execution under a *ca. sa.*, and while in the custody of the sheriff's officer was taken under a warrant on a charge of felony. He remained in the county gaol under the writ and warrant for more than twenty-one days: *Held*, that this was a sufficient lying in prison to constitute an act of bankruptcy.

- A surgeon, who was also licensed to practise as an apothecary, supplied medicines to his patients, but not to other persons: *Held*, that he was liable to become bankrupt as an apothecary. — *Ex parte Crabb. In re Palmer*, 277.
2. Saw-mill proprietors employed by a timber merchant to saw timber for him agreed to keep it insured from damage by fire, and to pay him the value of it if it should be burned. A fire having taken place, the timber was burned, and its quantity and quality were not in dispute, but the price had not been agreed upon before the sawyers became bankrupt: *Held*, that the value of the timber constituted a provable debt. — *Ex parte Bateman. In re Routledge*, 263.
3. Trustees of a settlement only * authorizing investments in govern- * 860
ment or real securities, advanced part of the trust moneys to a banking firm, in which one of the trustees was a partner, on the security of a mortgage of bonds in which some of the bankers were obligees. Afterwards another partner in the bank was appointed a new trustee of the settlement. The trust moneys were not called in. On the bankers becoming bankrupt, *held*, that there was a breach of trust on the part of the new trustee, constituting a provable debt against his separate estate.
- Other part of the trust moneys was paid with other moneys indiscriminately into the bank of the firm, to the private account of one of the partners, and an amount equal to the interest on these trust moneys was credited regularly by his direction to one of the persons interested under the settlement, but no other settlement was in evidence to affect the other partners with notice that the money thus paid in was subject to the trusts: *Held*, that the payment of interest was not sufficient for that purpose, and that the money paid in did not constitute a provable debt against the separate estates of the other partners.
- The new trustee did not inquire whether the old trustees had received further trust moneys under a covenant in the settlement to settle future property: *Held*, that this was not sufficient ground for charging him for wilful default in respect of sums which ought to have been got in by the old trustees, or in respect of sums received by the covenantor after the appointment of the new trustee and not settled, there having been nothing to lead to a suspicion that any default had been made by the old trustees or the covenantor in those respects.
- The bonds were left in the custody of the bankers, and no notice of the mortgage was given to any of the obligors. One of the partners and trustees of the settlement was the sole surviving obligee in one of the bonds: *Held*, that he was the real and not merely the reputed owner of the bond debt, but that he held it in trust, and that it was not in the reputed ownership of the firm or of himself.
- Others of the bonds had, without the knowledge of the *cestuis que trust*, been paid off and replaced by different securities, which the bankers had set apart and marked with the names of the trustees of the settlement: *Held*, that these securities were not in the reputed ownership of the bankers. — *Ex parte Geaves. In re Strahan*, 291.

4. A surety had paid a debt of the bankrupt after the bankruptcy, with interest down to the payment, and had proved for the whole amount paid, including interest subsequent to the *fiat*, but no dividend had been declared: * *Held*, by the Lord Justice KNIGHT BRUCE, the Lord Justice TURNER doubting, that an application to reduce the proof after seven years had elapsed and after the death of the surety, was too late. *Ex parte Sanderson. In re Alexander*, 849.
5. A mortgaged estate was sold with the concurrence of the mortgagees, free from the mortgage; and a part of the purchase-money was invested as an indemnity to the purchaser against some possible charges, and subject thereto in trust to secure a portion of the debt which had been secured by the mortgage. Afterwards the mortgagees, who were solicitors, borrowed money of a client, giving her a memorandum purporting to charge the mortgage debt (which they described as still secured on the property) with the money thus borrowed. On the solicitors becoming bankrupt, *Held*, —
That the memorandum created a charge upon the solicitors' interest in the indemnity fund.
That as one of the solicitors was one of the trustees of the fund, the notice which he had of the charge was sufficient to take it out of their order and disposition. — *Ex parte Rogers. In re Selby*, 271.
6. *Quere*, whether time-bargains in mining shares constitute gaming or wagering, or buying or selling stock within the 201st section of the Bankrupt Law Consolidation Act.
Where a bankrupt had lost more than 200*l.* in the year immediately before his bankruptcy in such transactions: *Held*, that a certificate might nevertheless be granted for what it was worth, where neither the assignees nor any creditor opposed. — *Ex parte Mellor. In re Mellor*, 248.
7. Where a bankrupt had purchased Turkish scrip, and the transaction was carried over from time to time, and resulted in a loss of upwards of 200*l.* in one year: *Held*, —
That it was doubtful whether the transactions constituted gaming and wagering, or a contract for the purchase or sale of stock, within the 201st section of the Bankrupt Law Consolidation Act.
That a certificate might, with the consent of the assignees, and no creditor opposing, be granted for what it might be worth.
That such dealings were at all events improper on the part of a trader, and that the certificate ought to be suspended. — *Ex parte Wade. In re Wade*, 241.

See INFANT, 2.

BARON AND FEME. See CONTINGENT REMAINDER. HUSBAND AND WIFE. BEGIN (RIGHT TO). See APPEAL, 1.

BENEFICE. See CHARITY.

* 862 * BENEFIT SOCIETY. See INSURANCE COMPANY.

BIDDINGS. See OPENING BIDDINGS.

BILL.

Any Judge of the Court may dispense with the general orders of the Court

where justice requires it, and this jurisdiction is not impliedly excluded by the 46th Order of August, 1852, from cases not within it.

Therefore, where from the illness of the plaintiff's solicitor, a printed copy of a written injunction bill had not been filed within the time limited by the 3d Order of August, 1852: *Held*, that the Master of the Rolls had properly ordered the bill to be restored to the file and the printed copy to be received, and that, notwithstanding the 3d Order, the plaintiff or his solicitor should not pay the defendant's costs occasioned by the omission to file a printed bill. — *Ferrand v. The Mayor, &c., of Bradford*, 93.

See FRAUDULENT DEED.

BILL OF COSTS. See COSTS, 1.

BOARD OF TRADE. See AWARD.

BREACH OF TRUST. See BANKRUPTCY, 3. INSOLVENT DEBTORS ACT, 2.

CERTIFICATE. See BANKRUPTCY, 6, 7. CHIEF CLERK'S CERTIFICATE.

CHAPEL. See CHARITY.

CHARGE. See BANKRUPTCY, 5. LEGACY.

CHARGING ORDER. See DECREE, 3.

CHARITY.

By a deed of 1446, a rectory was granted as part of an endowment for an almshouse within the precinct of a hospital, already endowed and having a chapel attached to it, reserving to the grantor a right (which was never exercised) of instituting a perpetual vicar of the rectory. By a private Act of 18th Elizabeth it was enacted, that the master of the hospital should not aliene the hospital nor the tithes of the rectory (which was described as adjoining the hospital), but that the church, house, and hereditaments belonging to the hospital should be held by the master and brethren thereof for charitable uses. The parish church of the rectory had been pulled down at a time which could not be ascertained, and the parishioners had used the chapel of the hospital, in which the baptisms, * marriages, and burials of the * 863 parishioners had been for a long series of years performed. In a suit to carry into effect the trusts of the hospital a receiver had been appointed. Upon a motion of the churchwarden of the parish, that he might, notwithstanding the appointment of a receiver, be at liberty to perform the duty of churchwarden in the chapel as the church of the parish, or might be examined *pro interesse suo*: —

Held, that a union of the parish with the hospital could not be presumed, and that the churchwarden had no right to interfere with the chapel.

Semble, that there is no precedent or principle for the union of the master-ship of a hospital with the rectory of a parish.

Semble, that if such union could be presumed from custom, a custom which was not shown to extend to the interference of the churchwarden of the parish with the chapel, would not lead to a presumption of a union authorizing such interference.

A churchwarden has no power to provide for the service of his church during vacancy. — *The Attorney-General v. St. Cross Hospital*, 38.

CHIEF CLERK'S CERTIFICATE.

1. After eight days from the date of a chief clerk's certificate, it stands on the same footing as a Master's report confirmed absolutely did under the old practice, and will not be discharged or varied except on special grounds. — *Howell v. Kightley*, 325.

2. Where, by a slip, a solicitor's clerk, who was conducting a cause, set it down for further consideration instead of applying to vary the certificate of the chief clerk, not being aware that counsel had advised that an application to vary the certificate ought to be made:—

Held, a proper case for allowing notice of motion to be given to vary the certificate. — *Ashton v. Wood*, 698.

"CHILDREN." See WILL, 5.

CHOSE IN ACTION. See HUSBAND AND WIFE.

CHURCH. See CHARITY.

CHURCH OF ENGLAND. See INFANT, 1. WILL, 14.

CHURCHWARDEN. See CHARITY.

CLASS. See WILL, 9.

CODICIL. See LEGACY. WILL, 13, 15, 16.

* 864 * COMMISSIONERS OF RAILWAYS. See AWARD.

COMPANY. See CONTRIBUTORY, 1, 2. INSURANCE COMPANY. LANDS CLAUSES ACT, 1, 2.

CONCURRENT JURISDICTION. See SURETY, 2.

CONDITIONS. See WILL, 2, 13, 14.

CONFIRMATION. See FRAUDULENT DEED.

CONSENT. See WILL, 13.

CONSIGNEE. See AGENT.

CONSTRUCTION.

The word "unmarried" in one part of a settlement held to mean not having a husband, although in another it was clearly used in the sense of "without having been married."

A fund was settled in contemplation of marriage, upon trust for the wife for life, then for the husband for life, then for the children of the marriage equally (subject to a power of appointment among them), to be paid at twenty-one, or in the case of daughters, on their attaining that age or marrying; and in the event of any of them, being a son or sons, dying under twenty-one, or being a daughter or daughters, dying under that age and "unmarried," the share of such child was to accrue among the others; with an ultimate trust, in the event of no child attaining a vested interest and of the wife dying in the husband's life, for such person or persons as would have been entitled to her personal estate under the Statute of Distributions if she had died "unmarried" and intestate: *Held*, that the word "unmarried" in the ultimate trust was to be construed "not having a husband at the time." — *Pratt v. Mathew*, 522.

See AGENT. CUMULATIVE GIFT. WILL.

CONSTRUCTIVE NOTICE. See NOTICE.

CONTINGENT DEBT. See INSOLVENT DEBTORS ACT, 1.

CONTINGENT INTEREST. See WILL, 6.

CONTINGENT LIABILITY. See BANKRUPTCY, 2.

CONTINGENT REMAINDER.

A testator devised land to his daughter for life, with remainder to her children in fee, but if there should not be any such child, or if all such children should die under twenty-one and without issue, then to the heirs and assigns of the * daughter. The daughter and her * 865 husband by deed acknowledged, according to 3 & 4 Will. 4, c. 74, in consideration of her husband having made large expenditure in improving the property, conveyed it to the use of the daughter for life, with remainder to the use of her children in fee, and in the event of there being no such child, to such uses as the husband should appoint, and subject thereto to the use of the husband in fee: *Held*, that, under the provisions of the Act, the conveyance was effectual in equity, if not at law also, to pass the wife's ultimate interest under the will, although that interest should be held to have been a contingent remainder, as to which *quære*.

Where there is an equitable title in a defendant to an action of ejectment, the Court will at his suit restrain the proceedings in the action, although there may be a question whether he would not be successful at law. — *Crofts v. Middleton*, 192.

CONTRACT. See FOREIGN LAW. WILL, 17.

CONTRIBUTORY.

1. The projectors of an intended joint-stock company issued a prospectus headed "The Amazon Life Assurance and Loan Company and Sick Benefit Society," and stating the intention of the projectors to form a loan and assurance company with a branch sick benefit society. The company was registered as "The Amazon Life Assurance and Loan Company." After this registration an application headed in the same way as the prospectus was made for shares, and an answer was returned headed with the registered title, and stating that shares in the company so registered had been allotted to the applicant. The applicant paid the deposits on the shares and received certificates headed with the registered title, but did not acknowledge the receipt of them or interfere any further. On the company being wound up: *Held*, that the allottee was not entitled to have his name removed from the list of contributories, on the ground that he had applied for shares in a different company, or on the ground that he had been informed that he would only incur a limited liability. — *Blackburn's Case. In re The Amazon Life Assurance and Loan Company*, 177.
2. The directors of a joint-stock banking company passed a resolution that the shares of one of them, who was desirous of retiring, should be taken by the company at par, and that a release and indemnity might be arranged with the solicitors of the parties. Upon the footing of this resolution the director retired, and after his retirement debts were

- * 866 contracted and ultimately the company was ordered to be wound up. The *director was placed upon the list of contributories, the resolution having been held by the Court, on appeal, not binding on the company: *Held*, that the part of the resolution as to indemnity depended on the validity of the retirement, and that a co-director, who had not been present when the resolution was passed, but continued to be a director afterwards, was not precluded by it from calling on the retired director to contribute to the repayment of what the other director had overpaid beyond his share in respect of the debts contracted after the date of the resolution. — *Walker's Case. In re The St. Marylebone Joint-stock Banking Company*, 607.

COPYRIGHT. See INJUNCTION.

COSTS.

1. Where a bill of costs against executors contained charges to a considerable extent beyond what would have been allowed them in their accounts with the testator's estate: *Held*, by Lord Justice TURNER, affirming the decision of Vice-Chancellor WOOD, *dissentiente* Lord Justice KNIGHT BRUCE, that it was a proper case of taxation at the instance of the persons beneficially interested after payment by the executors. — *In the Matter of Dickson*, 655.
2. On the taxation of the plaintiff's bill of costs (in a suit in which a bill for the production of title-deeds had been dismissed) the Master allowed charges for the settlement of the answer by the defendant's junior equity counsel and by his conveyancing counsel, who was familiar with the defendant's title, and also allowed a charge for an abstract of title laid before the junior equity counsel for the purpose of preparing the answer, but which abstract did not appear to have been prepared entirely for that purpose: *Held*, that these allowances ought not to have been made. — *Davis v. The Earl of Dysart*, 33.
3. The plaintiff left his residence shortly after filing his bill, but continued to pay rent for it. The defendants were unable to find him, or to obtain any information from his solicitors as to where he was: *Held*, a case for requiring security for costs. — *Manby v. Bewick* (No. 1.), 468.

See ACT OF PARLIAMENT. ACQUIESCENCE, 2. APPEAL, 2. BILL, DECREE, 2. INFANT, 3. LANDS CLAUSES ACT, 2. MORTGAGE, 2. WILL, 7.

COVENANT. See LEASE.

CREDITOR. See FRAUDULENT DEED.

- * 867 *CREDITORS' DEED. See INSOLVENT DEBTORS ACT.

CROSS EXAMINATION. See DOCUMENTS, 4.

CUMULATIVE GIFT.

A donor standing *in loco parentis* to several children executed a voluntary deed charging real estate with annuities in favour of the children and their mothers, the annuities to females being given to their separate use, and with a power of revocation. Fifteen years afterwards he executed another voluntary deed, not revoking or referring to the former, and giving annuities of smaller amounts, not secured on land, to some of the former annuitants, but not as regarded females, to their separate

use: *Held*, that the annuities were cumulative.—*Palmer v. Newell*, 74.

CUSTODY OF INFANT. See FOREIGN LAW.

DAMAGES. See BANKRUPTCY, 2. INJUNCTION.

DEBT. See INSOLVENT DEBTORS ACT, 1, 2.

DECLARATORY DECREE.

The Court will not make declarations of future rights in events which have not happened, and, therefore, where a testator having by his will given copyholds and leaseholds to trustees upon trusts to correspond with the uses of the devised freeholds, and by a codicil limited the freeholds differently after the death of the first tenant for life, but was silent as to copyholds or leaseholds: *Held*, by Lord Justice TURNER, that during the continuance of the life-estate the Court would not determine how far the ulterior limitations of the copyholds and leaseholds were affected by the codicil.—*Lady Langdale v. Briggs*, 391.

See WILL, 1.

DECREE.

1. A bill for partition of a freehold estate stated the death of one tenant in common in fee, having devised her moiety to the defendant's husband, and the death of the other tenant in common intestate, leaving the plaintiff her heir-at-law, but that the defendant's husband, who was an illegitimate son of a deceased brother of the intestate, and claimed to be her heir-at-law, concealing his illegitimacy, had entered upon and enjoyed the entirety, and had settled it by an ante-nuptial settlement, under which the defendant claimed. The bill also sought an account of rents and profits received by the defendant. The defendant by her answer submitted that her settlor was the intestate's heirs, but did not claim as a purchaser for value without notice. By the decree a reference * was directed to ascertain who was the intestate's heir-at-law, and the result of it was in favour of the plaintiff: *Held*, that a further inquiry, whether the defendant was a purchaser without notice, could not be directed on further consideration.—*Lyne v. Lyne*, 553. * 868

2. A decree directed a reference to the taxing master to tax the defendant's bills of costs, and a reference to the Master in Ordinary to take an account of all the dealings and transactions between the plaintiff and the defendants. By a subsequent order made on a motion it was directed that, notwithstanding the decree, both references should go to the taxing master: *Held*, —

That the order was erroneous, as varying the decree in such a manner in which it could not be varied without consent.

That matters unconnected with bills of costs could not, under the 9th Order of the 26th of October, 1842, be referred to the taxing master.—*King v. Savery*, 311.

3. A decree for payment of what shall be found due to the plaintiff upon an

account directed by the decree does not entitle him to a charging order under the 18th section of 1 & 2 Vict. c. 110. — *Chadwick v. Holt*, 584.

See DECLARATORY DECREE. MORTGAGE, 1. REHEARING. WILL, 1.

DEED. See CONSTRUCTION. FRAUDULENT DEED. REFORMING DEED.

DEED OF GIFT. See CUMULATIVE GIFT.

DELAY. See BANKRUPTCY, 4.

DEMAND. See LANDLORD AND TENANT.

DEMURRER. See ANSWER.

DEPOSIT. See MORTGAGE, 4.

DIRECTORS. See CONTRIBUTORY, 1, 2.

DISCHARGE. See INSOLVENT DEBTORS ACT, 2.

DISCOVERY.

Where a clergyman employed persons to act for him as brokers in dealings of a stock-jobbing kind, and in a suit for an account sought a discovery of the dealings between them: *Held*, that they could not protect themselves by alleging that the discovery would subject them to the penalties imposed by 57 Geo. 3, c. 40, on persons acting as brokers in the city of London without a license, it not being stated that the plaintiff was aware of the defendants' not being qualified. Whether it would have *made any difference if he had been aware of this, *quære*. — *Robinson v. Kitchen*, 88.

See ANSWER. DOCUMENTS.

DIVORCE. See FOREIGN LAW.

DOCKET. See JUDGMENT.

DOCUMENTS.

1. A defendant in his answer stated that, to the best of his knowledge, information, and belief, the documents which he admitted to be in his possession relating to the matters mentioned in the bill did not, nor did any of them, in any way, make out, evidence, or tend or support or tend to make out, evidence, or support the case or any part of the case made by the plaintiff, nor defeat or impeach or tend to defeat or impeach the case or defence, or any part of the case or defence of the defendant, but were evidence in support of the defendant's case. It appeared, however, on the face of the answer, that the defendant had not himself inspected the documents: *Held*, that upon this statement they were not protected from production. — *Manby v. Bewicke* (No. 3), 476.

2. Documents belonging to the East India Company relating to its political duties, held to be protected from production.

Semble, that documents not within the rules protecting them from production by reason of their own contents, will not be protected by their connection or association with protected documents. — *Wadeer v. The East India Company*, 182.

3. Where a plaintiff set out in his bill a letter written by the defendant, and stated that it was the plaintiff's intention to prove and put in evidence all letters which had passed between him and the defendant on the sub-

ject of the transactions in question, if so advised: *Held*, that the defendant was not entitled, before putting in his answer, to move for the production of the plaintiff's documents. — *Halliday v. Temple*, 96.

4. The common affidavit as to documents is not the subject of cross-examination. — *Manby v. Bewicke* (No. 2), 470.

DOMICILE.

Although permanent residence abroad without intent to return may not operate as a change of domicile, if believed to be necessary for health's sake, the circumstance, that such residence was occasioned by mere preference of climate, or by the opinion that the air or the habits of the country may be better suited to the health than those of the country which has been quitted, will not be sufficient to prevent such permanent residence from so operating. — *Hoskins v. Matthews*, 13.

See FOREIGN LAW.

* EAST INDIA COMPANY. See DOCUMENTS, 2.

* 870

ELECTION.

In determining what are cases of election, although a testator must be taken *prima facie* to have intended to dispose only of what belongs to him, there is no such rule as that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made clear by any thing short of positive declaration. The context of the will and the aptitude of the testamentary limitations to the testator's interest ought to be regarded.

Therefore where a testator limited estates of which he could dispose of the ultimate reversion only, together with estates of which he was seised in fee in possession, and the limitations of both corresponded to some extent with the limitations which as to the former property already existed and preceded the reversion, and the will contained a power of jointuring which was to come into operation when the tenants for life came into possession of all the devised estates, including those of which the testator had only the reversion after the estates for life: *Held*, that the testator must have intended to dispose of the whole interest and not merely the reversion, and that a case of election was raised. — *Wintour v. Clifton*, 641.

See INCUMBENT.

ENLARGING TIME. See REHEARING.

EQUITABLE PLEA. See SURETY, 2.

EQUITY TO A SETTLEMENT. See HUSBAND AND WIFE.

ESTATE TAIL. See WILL, 1.

ESTUARY COMPANY. See LANDS CLAUSES ACT, 1.

EVIDENCE. See DOCUMENTS, 3. MORTGAGE, 5.

EXCEPTION. See ANSWER.

EXECUTORS. See COSTS, 1.

EXONERATION. See MORTGAGE, 3.

EXPUNGING. See BANKRUPTCY, 4.

FEME COVERT. See CONTINGENT REMAINDER. HUSBAND AND WIFE.

* 871 * FORECLOSURE. See MORTGAGE, 1.

FOREIGN LAW.

When a Court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter, for if any part of the contract be inconsistent with the law and policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed.

Therefore, where an Englishman married a Frenchwoman, and they resided in France, where their children were born, and suits were instituted between them in both countries, and were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, and another part was, that one of the children should remain with his mother, and a third part related to the payment of an allowance to the wife: *Held*, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it. — *Hope v. Hope*, 731.

FORFEITURE. See WILL, 2, 14.

FRAUD.

After an offer had been made by the plaintiff to take a lease of a farm from the defendants, a draft was prepared by the defendants' solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendants' solicitors, and executed some repairs: *Held*, that, although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part-performance to take the case out of the Statute of Frauds, and a specific performance was decreed. — *Shilliber v. Jarvis*, 79.

See ACQUIESCENCE, 1, 2. MORTGAGE, 6. SPECIFIC PERFORMANCE.

FRAUDULENT DEED.

* 872 A father executed a voluntary deed, * assigning a considerable portion of his property to his sons, with the concurrence and by the advice of his brother, to whom he was largely indebted. He also made his will appointing his sons and his brother executors and trustees. The brother

acted under the will until his death, which took place seven years after that of the testator. He never took any step to impeach the voluntary deed, but was a party with the donees under it to instruments and transactions proceeding on the assumption of its validity: *Held*, that, after his decease, his representatives could not impeach the deed, as being void against creditors under the 13 Eliz. c. 5.

A plaintiff, in a creditors' suit, held not entitled to set up at the hearing a vendor's lien in respect of his debt, and without having adapted the frame of his bill to such a case. — *Oliver v. King*, 110.

FRENCH LAW. See FOREIGN LAW.

FURTHER CONSIDERATION. See DECREE, 1.

GAMING OR WAGERING. See BANKRUPTCY, 6, 7.

GENERAL ORDERS. See BILL.

GIFT. See CUMULATIVE GIFT.

GUARDIAN. See ACQUIESCENCE, 1. INFANT, 3.

HOSPITAL. See CHARITY.

HUSBAND AND WIFE.

A debt secured to a testator by warrant of attorney was appropriated by his executor, with the concurrence of a legatee and her husband, in satisfaction of the former's legacy, which was of the same amount. The legatee and her husband received interest on the debt: *Held*, that this was not a reduction into possession so as to defeat the wife's equity to a settlement.

The husband consented to a part of the debt being paid to a stranger, on having in lieu of the security of the debt to that extent a promissory note of the stranger for a like amount. *Quære*, whether this was a reduction into possession of that portion of the debt. — *Ex parte Norton*. *In re Selby*, 258.

See CONTINGENT REMAINDER. FOREIGN LAW.

INCORPORATION OF ACT. See ACT OF PARLIAMENT.

* INCUMBENT.

* 873

Where the right of electing the minister of a parish had been by deed vested in trustees in trust for the parishioners: *Held*, that it was not transferred to the vestry or otherwise affected by the Act 18 & 19 Vict. c. 120 (for the better local management of the metropolis), and the Act 19 & 20 Vict. c. 112 (amending the former), or either of them. — *Carter v. Copley*, 680.

INCUMBRANCE. See JUDGMENT.

INFANT.

1. A Roman Catholic left a widow, also a Roman Catholic, and a posthumous child. The widow, some time after her husband's death, became a

member of the Church of England, and without any interference on the part of the child's other relatives, who were all Roman Catholics, brought him up as a member of the Church of England, until he was upwards of nine years old; and it appeared, in an interview with him, that the distinctive doctrines of that church had taken a strong hold on his mind: *Held*, that it was too late for the Court to give directions that he should be educated in the faith of his father. — *Stourton v. Stourton*, 760.

2. An infant paid, by means of borrowed money, a premium on entering into a partnership, and before he became of age disaffirmed the contract: *Held*, that he could not have recovered back the premium had his partners remained solvent, and therefore could not prove for it under their bankruptcy. — *Ex parte Taylor. In re Burrows*, 254.
3. Where a father who was not of ability to maintain his daughter had, as her guardian, received the rents of her property, but had maintained her during her infancy and till her marriage, and had spent a considerable sum in the costs of a suit relating to her property, which ended beneficially for her, but of which her estate had to bear the costs: *Held*, that he was, in the circumstances of the case, entitled to retain the rents so received, by way of allowance for her education and his expenditure on her behalf. — *Wright v. Vanderplank*, 133.

See ACQUIESCENCE, 1. FOREIGN LAW.

INJUNCTION.

In a case of alleged fraudulent imitation of a musical publication (independently of copyright), where the Court did not consider the fraud clearly made out: *Held*, that an injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action, and to be answerable in damages.

Semble, that it is now almost universally the practice, on granting an inter-

- *874 locutory injunction, to require an undertaking to be answerable * in damages. — *Chappell v. Davidson*, 1.

See BILL. CONTINGENT REMAINDER. SURETY, 2.

INSOLVENT DEBTORS ACT.

1. A contingent debt is not barred by a discharge under the Insolvent Debtors Act (1 & 2 Vict. c. 110).

Therefore, where a bond was given to secure payment of 1000*l.* in the event of the obligor becoming entitled in possession to an estate of which his father was tenant in tail in remainder after a prior estate tail, and the obligor took the benefit of the Insolvent Act, and inserted the 1000*l.* in his schedule of debts, and obtained his final discharge, but the obligee had never claimed to prove in respect of the bond: *Held*, on the obligor becoming entitled in possession to the estate, that the bond debt was not satisfied, but was payable under the trusts of a creditors' deed. — *Hawker v. Hallewell*, 318.

2. The discharge of an insolvent under the 1 & 2 Vict. c. 110, extends to a breach of trust, although the amount due in respect of it may not be ascertained, except by a decree made subsequently to the discharge.

Where, therefore, a *cestui que trust* instituted a suit in respect of a breach of trust against a solvent trustee, and one who had been discharged under the above Act: *Held*, that the decree had properly been only made for payment against the former, with leave to prove under the insolvency of the latter. — *Thompson v. Finch*, 560.

INSURANCE COMPANY.

In a suit for winding up the affairs of a mutual company, which was formed for the purposes, among others, of insuring the payment of sums of money during the sickness and on the death of its members, and of receiving deposits at interest, and the rules of which, as well as the terms of its policies, provided that the funds of the society should alone be answerable for the claims of insurers, a decree was made which, among other things, declared that the insurers had a charge on so much of the capital and fund as was attributable to the insurance branch; and the decree contained directions for the valuation of immature assurances. On appeal the decree was varied, and, as varied, declared that the capital and funds ought to be applied to answer the claims of the insurers and depositors. But it was not disturbed as to the direction for valuation.

Form of decree in such a case. — *Evans v. Coventry*, 835.

JUDGMENT.

Where a docket of a judgment did not set forth the number roll, but this appeared on the entry of the issue in the same book: *Held*, by * Lord Justice TURNER, affirming the decision of Vice-Chancellor * 875 KINDERSLEY, *dubitante* Lord Justice KNIGHT BRUCE, that the judgment did not, within 4 & 5 Will. & Mary, c. 20, affect a purchaser, and that he was not precluded from disputing its validity by the circumstance of a conveyance under which he claimed title, and which was a trust deed for the benefit of creditors executed after the judgment was entered up, being expressed to be made subject to the incumbrances affecting the estates conveyed. — *Brandling v. Plummer*, 747.

JURISDICTION. See ANSWER. CONTINGENT REMAINDER. DECLARATORY DECREE. SURETY, 2. WILL, 1.

JUST ALLOWANCES. See TRUSTEES, 2.

LACHES. See ACQUIESCENCE, 2, 3.

LANDS CLAUSES ACT.

1. An estuary company was by its Act, with which the Lands Clauses Consolidation Act was incorporated, empowered to make and maintain certain cuts and works, and to enter upon, take, and use such of the lands delineated in the deposited plans as might be necessary for that purpose.

Held, that the company were not entitled to take compulsorily land which

was required not for the site of the cut or works, but to supply materials for the execution of works on other land. — *Bentinck v. The Norfolk Estuary Company*, 714.

2. An order made under the Lands Clauses Consolidation Act directed the dividends of stock arising from the investment of the purchase-money of land taken by a railway company to be paid to the incumbent of a parish for the time being, but only provided for the payment of the costs of the then incumbent of the application on which the order was made. A subsequent incumbent executed a power authorizing an attorney to receive the dividends for him under the order, and filed affidavits showing himself to be the incumbent. On the company declining to pay his costs thus incurred, he applied in chambers for an order for their taxation and payment, which was ordered accordingly: *Held*, on the appeal of the company, that the order was rightly made. — *Ex parte the Incumbent of Guilden Sutton*, 380.

See ACT OF PARLIAMENT.

LANDLORD AND TENANT.

- A lease for years contained a covenant to pay rent, and a proviso for re-entry on non-payment of rent, the rent "being first lawfully demanded." The property being vacant, the landlord asked for
- * 876 * payment of rent from the person liable to pay it, and, not receiving it, re-entered: *Held*, that there had been a sufficient demand, and that the lease was effectually determined. — *Manser v. Diz*, 708.

LAND-OWNER. See LANDS CLAUSES ACT, 1.

LEASE.

An agreement to take an assignment of a lease followed by possession on the part of the assignee are not sufficient to give the lessor any right to sue the assignee in equity on the covenants in the lease. — *Cox v. Bishop*, 813.

See LANDLORD AND TENANT.

LEGACY.

Real and personal estates were given by will upon trust as to the real estates, to pay such of the testatrix's debts, funeral and testamentary expenses as her personal estate was insufficient to satisfy, and subject thereto in trust as to all the residuary real and personal estate for the testatrix's grandchildren. By a codicil the testatrix directed her trustees acting under her will to pay certain legacies: *Held*, that these legacies were charged on the real estate, although given to legatees in addition to legacies which by the will were directed to be paid out of the personal estate. — *Gallemore v. Gill*, 567.

See WILL, 7, 10, 11.

LEGAL ESTATE. See TRUSTEE, 1.

LESSOR. See FRAUDS (STATUTE OF).

LETTER OF ATTORNEY. See AGENT.

LIMITATIONS.

A reversioner in fee expectant on the death of the survivor of two tenants for
[678]

life granted an annuity for ninety-nine years determinable with lives, and with a surety covenanted for payment of the annuity. He also demised the reversion for 500 years in trust, if the annuity should be in arrear, to sell the reversion and raise the arrears and future payments of the annuity. The grantor and surety became bankrupts, and when the annuity had been in arrear more than twenty years, the annuitant filed a bill to have the arrears raised: *Held*, that the Statute of Limitations did not apply. — *Snow v. Booth*, 69.

LIVING. See CHARITY. WILL, 9.

LOCAL MANAGEMENT ACT. See INCUMBENT.

LUNATIC. See MORTGAGE, 2. TRUSTEE, 4.

* LYING IN PRISON. See BANKRUPTCY, 1.

* 877

MAINTENANCE. See ACQUIESCENCE, 1. INFANT, 3.

MARRIAGE WITH CONSENT. See WILL, 13.

MARRIED WOMEN. See CONTINGENT REMAINDER.

METROPOLIS. See INCUMBENT.

MINES. See ACQUIESCENCE, 3.

MINING SHARES. See BANKRUPTCY, 6.

MISREPRESENTATION. See CONTRIBUTORY, 1.

MISTAKE. See MORTGAGE, 5.

MORTGAGE.

1. In a foreclosure suit against puisne mortgagees and the mortgagor, an order must be made foreclosing the former absolutely, before proceeding to foreclose the mortgagor. — *Whitbread v. Lyall*, 383.
2. The plaintiffs in a suit for the administration of a mortgagor's estate, and the purchasers under a decree in the suit, presented a petition under the Trustee Act seeking an order to vest in the purchasers the legal estate in the purchased property, which was vested in a lunatic mortgagee not found so by inquisition: *Held*, that a portion of the costs ought to be paid out of the mortgage money. — *In re Viall*, 439.
3. A testator had, after mortgaging an estate, settled it subject to the mortgage upon trusts for himself for life, with remainders over, leaving in himself the ultimate reversion in fee, which he devised by his will (before the passing of the 17 & 18 Vict. c. 113): *Held*, that his general personal estate ought to be exonerated from the mortgage debt. — *Lady Langdale v. Briggs*, 391.
4. One of two executors and trustees who had in their possession title-deeds of an estate of which their testator and a debtor to his estate had been tenants in common, requested the debtor to allow the executor to retain the title-deeds as a security for the debt. The debtor wrote an answer, saying, that the executor might retain the deeds till the debtor got the whole of his affairs settled with the executors, and that he was endeavouring to arrange so as to buy or sell the property: *Held*, a good equitable mortgage for the debt.

A father-in-law paid a mortgage debt secured on his son-in-law's prop-

erty and took a receipt from the mortgagee, in which the mortgagee agreed to reconvey the property when required: *Held*, not to have shown an intention to exonerate the property. — *Fenwick v. Potts*, 506.

5. Where a mortgage-deed had been mislaid for many years, and interest had been paid and received at a lower rate than that reserved by the deed, the payment having been made during a portion of the time under a decree in an administration suit on an affidavit as to the contents of the missing deed: *Held* (the case not being one to which the Statute of Limitations applied), that a tenant for life of the interest on the mortgage debt, who was not shown to have agreed to take less than the reserved interest, was entitled to payment of the differences since she became tenant for life. — *Gregory v. Pilkington*, 616.

6. A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage. *Held*, that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage (his fraud not excluding the effect of such notice), and took subject to it, except to the extent of money paid by him in satisfaction of the first mortgage.

Seemle, by L. J. TURNER, that even if the second mortgagee had not been the solicitor of the new mortgagee, the omission on the part of the new mortgagee to require production of the second mortgage-deed was such negligence as to postpone him. — *Atterbury v. Wallis*, 454.

See BANKRUPTCY, 5. POLICY OF ASSURANCE. SURETY, 1. TRUSTEE, 3.

NAME AND ARMS CLAUSE. See WILL, 1, 2.

NEGLIGENCE. See MORTGAGE, 6.

NOTICE.

When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such possession should be continually visible or actively asserted. Where therefore the purchasers of mines took possession under the agreement for purchase without any conveyance: *Held*, that a subsequent purchaser of the land without any exception of mines took with notice of the agreement, and was bound specifically to perform it. — *Holmes v. Powell*, 572.

See BANKRUPTCY, 3, 5. DECREE, 1. MORTGAGE, 6.

* 879 * OPENING BIDDINGS.

A sale took place under a decree by tender, made pursuant to an adver-

tisement, which stated that the sale was to be subject to the contract receiving the sanction of the Judge, and to conditions, one of which was, that the certificate of sale would in due course be signed and filed, and become binding without a further notice or expense to the purchaser. On the 8th day of February, the appellant was certified by the chief clerk to be purchaser. A summons was taken out on the 12th by a respondent seeking to open the biddings offering an advance, and was on the 13th served on the appellant. The certificate was signed on the same day by the Judge: *Held*, that the Court was not precluded from opening the biddings and reselling. — *Osborne v. Foreman*, 122.

ORDER AND DISPOSITION. See BANKRUPTCY, 3, 5.

PARENT AND CHILD. See ACQUIESCENCE, 1. INFANT, 3.

PARISH. See INCUMBENT.

PAROL. See FRAUDS, STATUTE OF. SPECIFIC PERFORMANCE, 2.

PART PERFORMANCE. See FRAUDS, STATUTE OF.

PARTIES. See WILL, 6.

PARTNERS. See ACQUIESCENCE, 3.

PARTNERSHIP. See AGENT. INFANT, 2.

PAYMENT OUT OF COURT. See ACT OF PARLIAMENT.

PENALTIES. See DISCOVERY.

PETITION. See TRUSTEE, 4.

PLEA. See SURETY, 2.

PLEADING. See DECREER, 1. FRAUDULENT DEED. WILL, 6.

POLICY OF ASSURANCE.

A debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life in the creditor's name, as a collateral security. The policy was effected, but after a time neither the debtor nor his surety paid the premiums on the policy, though required to do so * by the * 880 creditor, who paid them himself: *Held*, on the death of the debtor, that he and his surety had not abandoned the policy, but that it was redeemable by the surety on repayment of the premiums paid by the debtor. — *Drysdale v. Piggott*, 546.

See INSURANCE COMPANY. SURETY, 1.

POSTPONEMENT. See MORTGAGE, 6.

POWER. See WILL, 12.

POWER OF ATTORNEY. See AGENT.

PRACTICE. See BILL. INJUNCTION. OPENING BIDDINGS. SPECIAL CASE.

PREMIUM. See INFANT, 2.

PRESUMPTION. See MORTGAGE, 5.

PRINCIPAL AND SURETY. See SURETY.

PRINTED BILL. See BILL.

PRIORITY. See MORTGAGE, 6.

PRISON, LYING IN. See BANKRUPTCY, 1.

PRIVILEGE. See DOCUMENTS, 2.

PRODUCTION. See DOCUMENTS, 1, 2, 3.

PROOF. See BANKRUPTCY, 2, 3, 4. INFANT, 2. INSOLVENT DEBTORS ACT, 1. INSURANCE.

PROTECTION. See DISCOVERY.

PROTESTANT. See WILL, 14.

PUBLIC COMPANY. See CONTRIBUTORY, 1, 2. INSURANCE COMPANY. LANDS CLAUSES ACT, 1, 2.

PUBLIC POLICY. See FOREIGN LAW.

PURCHASER. See DECREE, 1. JUDGMENT. NOTICE.

RAILWAY ACT. See ACT OF PARLIAMENT.

RAILWAY COMPANY. See AWARD. LANDS CLAUSES ACT, 2.

*881 *RECTIFICATION. See REFORMING DEED.

RECTOR. See INCUMBENT.

RECTORY. See CHARITY.

REFORMING DEED.

A deed may be reformed so as to be plainly confined to the object intended, where its operation as it stands is doubtful.

An appointment under a settlement limited the settled estates to such uses as a husband and wife should jointly appoint, but by mistake omitted to give them life-estates. On discovering the error, they instructed a solicitor to frame such a deed as would remedy it. The solicitor prepared a deed which remedied the defect, but was framed by way of complete relimitation of the uses, and thus raised a question whether a testamentary appointment which the wife had made in the mean time, but of which the solicitor was unaware, was not revoked: *Held*, a proper case for reforming the deed. — *Walker v. Armstrong*, 531.

REHEARING.

On a petition for rehearing, circumstances subsequent to the order sought to be reheard cannot be regarded; and where those circumstances raise important questions, it is not just or expedient to enlarge the time prescribed by the General Orders for presenting petitions of rehearing before the Court has had an opportunity of seeing how those circumstances will be presented for its consideration. Where, therefore, petitions for rehearing of orders made upwards of forty years previously, stated grounds for discharging the orders and setting aside a settlement made in pursuance of them, notwithstanding the length of time and intervening dealings and circumstances: *Held*, that the proper course was to order the petitions of rehearing to stand over for a limited time, with liberty to apply, and without prejudice to the rights of the petitioners to institute new suits, at the hearing of which the rehearing of the former orders might, if proper, be directed. — *Horne v. Barton*, *Head v. Crossfield*, *Head v. Bartley*, 587.

RELIGION. See INFANT, 1.

RENT. See LANDLORD AND TENANT.

REPEAL. See ACT OF PARLIAMENT.

REPUGNANCY. See WILL, 3, 4.

REPUTED OWNERSHIP. See BANKRUPTCY, 3, 5.

* RESIDUE. See WILL, 15.

* 882

RES JUDICATA. See SURETY, 2.

RETIRED DIRECTOR. See CONTRIBUTORY, 2.

REVERSION. See LIMITATIONS.

REVOCATION. See WILL, 15, 16, 17.

ROLL. See JUDGMENT.

ROMAN CATHOLIC. See INFANT, 1.

SALE. See OPENING BIDDINGS. TRUSTEE, 3. WILL, 17.

SECURITY FOR COSTS. See COSTS, 3.

SERVICE. See TRUSTEE, 4.

SETTLEMENT. See BANKRUPTCY, 3. CONSTRUCTION. HUSBAND AND WIFE.

SOLICITOR. See MORTGAGE, 6.

SOLICITOR AND CLIENT. See ACQUESCENCE, 2. COSTS, 1.

SPEAKING AT DEATH. See WILL, 10, 12.

SPECIAL CASE.

Where the facts and questions stated on a special case were such as did not enable the Court to determine the rights of the parties: *Held*, that the proper course was to discharge the order made below on the case without prejudice to any question.

It is not a proper use of the Act of Parliament to come to the Court for its opinion on a partial or garbled statement of facts. — *Bulkeley v. Hope*, 36.

See WILL, 6.

SPECIFIC LEGACY. See WILL, 10.

SPECIFIC PERFORMANCE.

1. In the absence of special circumstances, a Court of Equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser; and the circumstances of the case not appearing to the Court sufficient to constitute a waiver of the objection, a bill for specific performance was *dismissed with a fixed *883 amount of costs. — *Denne v. Light*, 774.

2. It was part of an agreement to purchase a farm that the vendor should, for twelve years from the completion, be at liberty to require, at his own expense, and the purchaser agreed to grant him a lease of the farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase, "&c." The vendor, just before the completion, wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money (which had already been paid), but stating that the letter was a temporary thing until the completion of

the purchase and the execution of an agreement already prepared and intended to be executed. The agreement referred to had been engrossed, and provided for the payment of a rent calculated on the aggregate amount of the purchase-money and expenses of the purchase and of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession, and paid rent calculated on the aggregate amount: *Held*, —

1. That there was a sufficient part performance to exclude a defence founded on the Statute of Frauds to a bill for specific performance of the agreement to take a lease.

2. That the option had been exercised by the vendor to take a lease.

3. That the agreement was sufficiently definite to be specifically performed. — *Powell v. Lovegrove*, 357.

See FOREIGN LAW. FRAUDS, STATUTE OF.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF. SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS. See LIMITATIONS.

STOCK JOBBING. See BANKRUPTCY, 7. DISCOVERY.

SUBSTITUTIONAL GIFT. See CUMULATIVE GIFT.

SURETY.

1. Where a mortgage was taken in part in respect of a sum for which the mortgagee represented himself to the mortgagor as being liable as a surety for the latter, and such representation was erroneous, to the knowledge of the mortgagee: *Held*, that to that extent the security could not be supported.

A debtor deposited a policy with his creditor as a security. Afterwards the debtor, with a surety who did not know of the deposit, covenanted with the creditor for payment of the debt, and contemporaneously the debtor executed a deed of counter security to the surety, neither deed referring

- * 884 to the deposit of the policy. *Subsequently the debtor assigned the policy to the creditor as a security: *Held*, that the surety, on paying the debt, was entitled to the policy. — *Lake v. Brutton*, 440.

2. Where a surety joined in a covenant on the understanding that an intending co-surety, who was purported to be made a co-covenantor, would execute the deed containing the covenant, but he failed to do so, and the covenantees nevertheless advanced the money purported to be secured by the deed: *Held*, —

1. That the surety who executed the deed was entitled to an injunction against proceedings at law upon it.

2. That he had not lost his right by setting up this defence at law by equitable plea, to which the covenantees demurred in such a way as might leave the equitable ground untouched. — *Evans v. Bremridge*, 100.

SURGEON. See BANKRUPTCY, 1.

SURVEYING. See WILL, 9.

SURVIVORSHIP. See WILL, 5, 6.

TAIL. See WILL, 1.

TAXATION. See ACQUIESCENCE, 2. COSTS, 1, 2. DECREE, 3.

TAXING MASTER. See DECREE, 2.

TIME. See BANKRUPTCY, 4. CHIEF CLERK'S CERTIFICATE, 2. REHEARING.

TRADING. See BANKRUPTCY, 1.

TRUST. See BANKRUPTCY, 3. CHARITY. INSOLVENT DEBTORS ACT, 2.

TRUST DEED. See INSOLVENT DEBTORS ACT.

TRUSTEE.

1. A testator, after the Apportionment Act, 4 Will. 4, c. 22, devised freehold lands to two trustees, their heirs and assigns, upon trust to pay thereout to his widow an annuity for her life, and after her decease, then upon trust for A. and B., their heirs and assigns, as tenants in common: *Held*, that the legal estate in the trustees was not restricted to the life of the widow. — *Fenwick v. Potts*, 506.
2. Where there was a reasonable ground for contending that a legacy * was a charge upon an estate vested in trustees for sale, and * 885 they, in the exercise of a *bond fide* discretion for the purpose of satisfying a purchaser who refused to complete unless the legacy was discharged, paid it: *Held*, that, whether the objection would have been tenable or not, the payment ought to be allowed to the trustees as between them and the persons beneficially interested. — *Forshaw v. Higginson*, 827.
3. Under a trust to sell property which was subject to a mortgage, and out of the proceeds to pay off the mortgage and pay the surplus to the mortgagor: *Held*, that a sale subject to the mortgage was valid. — *Manser v. Dix*, 703.
4. A petition for an order vesting in new trustees property of which a trustee has become lunatic ought to be served on his committee. — *In re Saumarez*, 390.

See BANKRUPTCY, 3.

TRUSTEE ACT. See MORTGAGE, 2.

UNDUE INFLUENCE. See ACQUIESCENCE, 1, 2.

UNION. See CHARITY.

UNLIQUIDATED DAMAGES. See BANKRUPTCY, 2.

UNMARRIED. See CONSTRUCTION.

VALUATION. See INSURANCE COMPANY.

VARYING CERTIFICATE. See CHIEF CLERK'S CERTIFICATE, 1, 2.

VARYING DECREE. See DECREE, 2.

VENDOR AND PURCHASER. See OPENING BIDDINGS. SPECIFIC PERFORMANCE, 1.

VESTED INTEREST. See WILL, 4, 6, 7, 8, 9.

VESTRY. See INCUMBENT.

VOLUNTARY DEED. See FRAUDULENT DEED.

WARD OF COURT. See INFANT, 1.

WAY. See SPECIFIC PERFORMANCE, 2.

WIFE. See CONTINGENT REMAINDER. HUSBAND AND WIFE.

WILFUL DEFAULT. See BANKRUPTCY, 3.

* 886 * WILL.

1. A testatrix devised a certain specified estate to trustees in trust for her niece and her niece's children (provided she took "the name of Cranmer and arms, and her children"), with the testatrix's mansion-house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, the India cabinet and striking watch, the testatrix's diamond ear-rings and pins as heirlooms, with the testatrix's estate; and the testatrix gave her residuary real estate to the niece, her heirs, and assigns for ever. The niece had, to the testatrix's knowledge, at the date of the will, several children, some of whom survived the testatrix: *Held*, that the niece took an estate tail.

Held, also, that where some of the parties interested in the construction of a purely legal devise are infants, the Court cannot at the request of the parties make a declaratory decree as to their rights under such a devise. — *Webb v. Byng*, 638.

2. A testator was, under a deed of re-settlement of his family estates, entitled to a reversion in fee, subject to an estate for life in his only son, who was a bachelor, and to remainders in tail to the first and other sons of that son. The testator soon afterwards devised all his real estates to his eldest daughter for her life, with remainder to her first and other sons in tail, with remainders to his other daughters for life and to their sons in like manner. The will contained a name and arms clause determining the estate of any person who should become "entitled to the possession or to the receipt of the rents and profits" of the estates, and not assume the family name and arms within a year after becoming so entitled. In several other parts of the will, provisions were made respecting persons who, by virtue of the will, should be in the "actual possession" of the property or "entitled to the rents and profits thereof." The son died without issue two years after the testator, and the first tenant for life under the will assumed the name and arms of H. within a year after her brother's death: *Held*, that there was no forfeiture, either as to the family estates, or as to property to which the testator had become entitled in fee-simple in possession after the date of the will. — *Lady Langdale v. Briggs*, 391.

3. A testator devised real estate to his second son in fee if he attained twenty-one, charged with a legacy to a daughter, and if the second son died under twenty-one, then to the eldest son when he attained twenty-one, charged with the legacy; and in case it should happen that all the testator's three children should die without issue, and without appointing the disposal of the estate, then over: *Held*, that the devise over was repugnant and void. — *Gulliver v. Vaux*, 167.

* 887 * 4. A testator gave real and personal estate upon trust for his son, to vest in him on his attaining the age of twenty-one years, but if he

should die under twenty-one, or having attained twenty-one should not have made a will, then the testator directed the property to be sold, and the proceeds to be held on other trusts: *Held*, that the property vested in the son absolutely at twenty-one, and that the gift over was repugnant and void. — *Holmes v. Godson*, 152.

5. A testator bequeathed a fund in trust to his sister A. for life, and after her death to be divided between the children of his sisters B., C., and D., who should survive the testator, such children taking *per stirpes* "with benefit of survivorship among members of the same family:" *Held*, that the latter words of themselves meant survivorship at the death of the tenant for life, and could not be otherwise interpreted by comparison with other bequests in the same will, showing an intention that those bequests should not go over if the legatee had children.

Held, also, that the survivorship applied to accrued shares.

Where a testator bequeathed a fund in trust for the children of his late sister A. (the issue of her daughter B. excepted), and of his sisters C. and D. *per stirpes*: *Held*, that grandchildren of C. were entitled to participate. — *In re Crawhall's Trust*, 480.

6. Personal estate was bequeathed upon trust to pay the income to the testator's wife till his youngest child attained twenty-one, she maintaining the children during their minorities, and then the capital was to be divided among the wife and children (by name), with benefit of survivorship: *Held*, that the survivorship referred to the period of distribution, and that a child did not, on attaining twenty-one, acquire an indefeasible interest.

Trustees ought to be parties to a special case to determine the construction of the instrument creating the trust. — *Vorley v. Richardson*, 126.

7. A testator bequeathed pecuniary legacies to two nephews and a niece by name, if they respectively survived him and attained twenty-one, when the nephews' legacies were to be "paid." In the case of the death of either of the nephews or of the niece leaving issue, such issue to take the parent's legacy as the parent should by will appoint. But in case of the death of either of the nephews or the niece before his or her legacy became payable, the legacy to go to the survivors. During the minorities of the legatees the trustees were to apply the income of the legacies for their maintenance and education. The legacy of the niece or any share she might acquire by the death of her brothers, or either of them, was to be settled for her separate use: *Held*, that, upon the whole context, * the word "paid" must be con- * 888 strued as "vested" or "payable," and that the executory gift to the issue would take effect in the event of the parent dying after attaining twenty-one.

Where a legacy has been severed from the residue, and a question arises respecting it, the costs of determining such question come out of the legacy. — *Martineau v. Rogers*, 328.

8. Under a devise of real estate in trust for the testator's widow for her life,

and at her death to sell the property and divide the proceeds among the testator's five children by name, "or their heirs or assigns:" *Held*, that the children took absolutely on the death of the testator. — *In re Walton's Estate*, 173.

9. A will contained a bequest to the testator's wife for life, with a direction that it was, after her decease, to become the property of M., "or, in case of her decease, to be equally divided between her children living." M. died in the testator's lifetime, leaving an only child, who survived the testator, but died in the lifetime of his widow: *Held*, that the representatives of the only child of M. were entitled to the bequest. — *Hodgson v. Smithson*, 604.
10. Where a testator after the date of his will became entitled to the personal estate of a deceased sister, as one of her next of kin: *Held*, that under the Wills Act, leaseholds forming part of the sister's general estate passed under a specific bequest of the testator's leasehold property. — *Lady Langdale v. Briggs*, 391.
11. Bequest in these terms by a testatrix having, among other property, government securities and bank stock, — "the whole of my fortune now standing in the funds:" *Held*, not *falsa demonstratio*, nor to extend to the bank stock, but to be restricted to the government securities. — *Grainger v. Slingsby*, 385.
12. Where a power to appoint among children was in default of any joint appointment by the husband and wife to be exercised by the survivor after the death of the other: *Held*, that a will made during their joint lives by the one who survived did not speak at his death, so as to be an execution of the power. — *Cave v. Cave*, 131.
13. A father by will gave his daughter an annuity, and also in case she did not marry before the age of twenty-eight, a legacy of 1000*l*. By a codicil on the same paper, he gave her "furthermore" 5000*l*. "upon the terms hereinbefore mentioned." A suitor of the daughter wrote to the testator after the date of his will, and before she attained twenty-eight, proposing to marry her, in answer to which the testator stated what provision he meant to make for her in his lifetime, but did not mention the above intended testamentary dispositions. He added, * that the marriage had his qualified consent, but that he must hear from his daughter before he made it absolute. The daughter wrote to the testator expressing her consent, to which, being very ill, he replied, that he could not appoint a time to attend to business. He shortly afterwards died without making any further communication on the subject, and subsequently the marriage took place before the daughter attained twenty-eight: *Held*, —
 * 889 That the 5000*l*. was subject to the same condition as the 1000*l*.
 Per Lord Justice TURNER, that the testator had not given an unconditional consent to the marriage.
 Per Lord Justice KNIGHT BRUCE, that even if the consent to the marriage ought to be considered as having become absolute, the daughter was not entitled to the 1000*l*. or 5000*l*. — *Younge v. Furse*, 756.

14. A testator gave real estate to his son's children as tenants in common in tail, and personal estate to them as tenants in common, with an accruer clause on death under twenty-one, and declared that these gifts were upon condition that the son's children were educated in England according to the rites of the Church of England, and that if any one or more of them should be educated abroad or not in the Protestant religion according to the rites of the Church of England, the share of such one or more should go to such of the children as were educated in England in the Protestant religion according to the rites of the Church of England, with a gift over if all were educated abroad or not in the Protestant religion according to the rites of the Church of England. The son went to France and was there detained as a prisoner of war. Of his children, the eldest son and two daughters went to schools in France kept by Roman Catholics, at which, however, a Protestant minister attended. The eldest son, when about fifteen years of age, came to England and completed his education at Harrow and at the military academy at Woolwich. The daughters remained in France till they were sixteen and seventeen years old, when they came to England and went to a Protestant school: *Held*, that the devises and bequests to the eldest son and the daughters were not forfeited. — *Clavering v. Ellison*, 662.

15. A testator by his will gave the dividends of specific sums of stock of different amounts to his sons and daughters by name respectively for their respective lives, and on the death of any son or daughter he gave the capital sum of which he had given the dividends to such son or daughter, to his or her children at twenty-one, and if no such child attained twenty-one, the said capital sum was to * fall into * 890 the residue, the interest of which he bequeathed to his widow for life, and after her death to the sons and daughters "during their several and respective lives, to be divided between them," in proportion to the specific sums of stock of which the dividends were bequeathed to them respectively. After "the decease" of the testator's "said children," the capital of the residue was to be divided among the children's children at twenty-one, and if any grandchild died under twenty-one, its share was to be divided among the survivors at twenty-one or their issue, and after the death of the widow and all the testator's "children and grandchildren without issue as aforesaid," over. By codicils the testator revoked the bequests to two of his sons and a daughter, and gave them for their lives the dividends of smaller specific sums of stock than those so given by the will: *Held*, —

That, under the will, the income of the residue was divisible among the children, and the survivors and survivor of them, till the death of the last survivor.

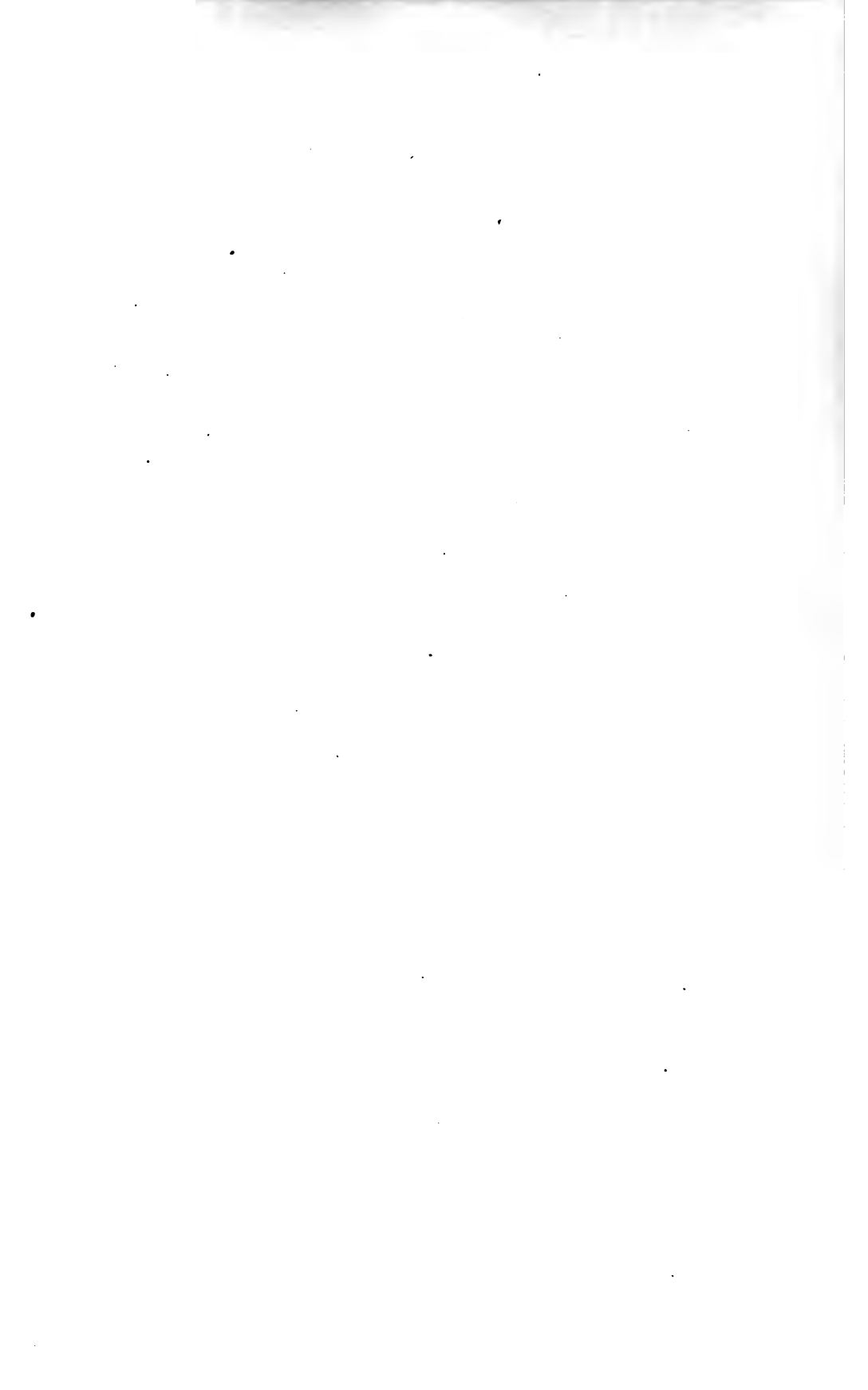
That the codicils only revoked the gifts of the dividends.

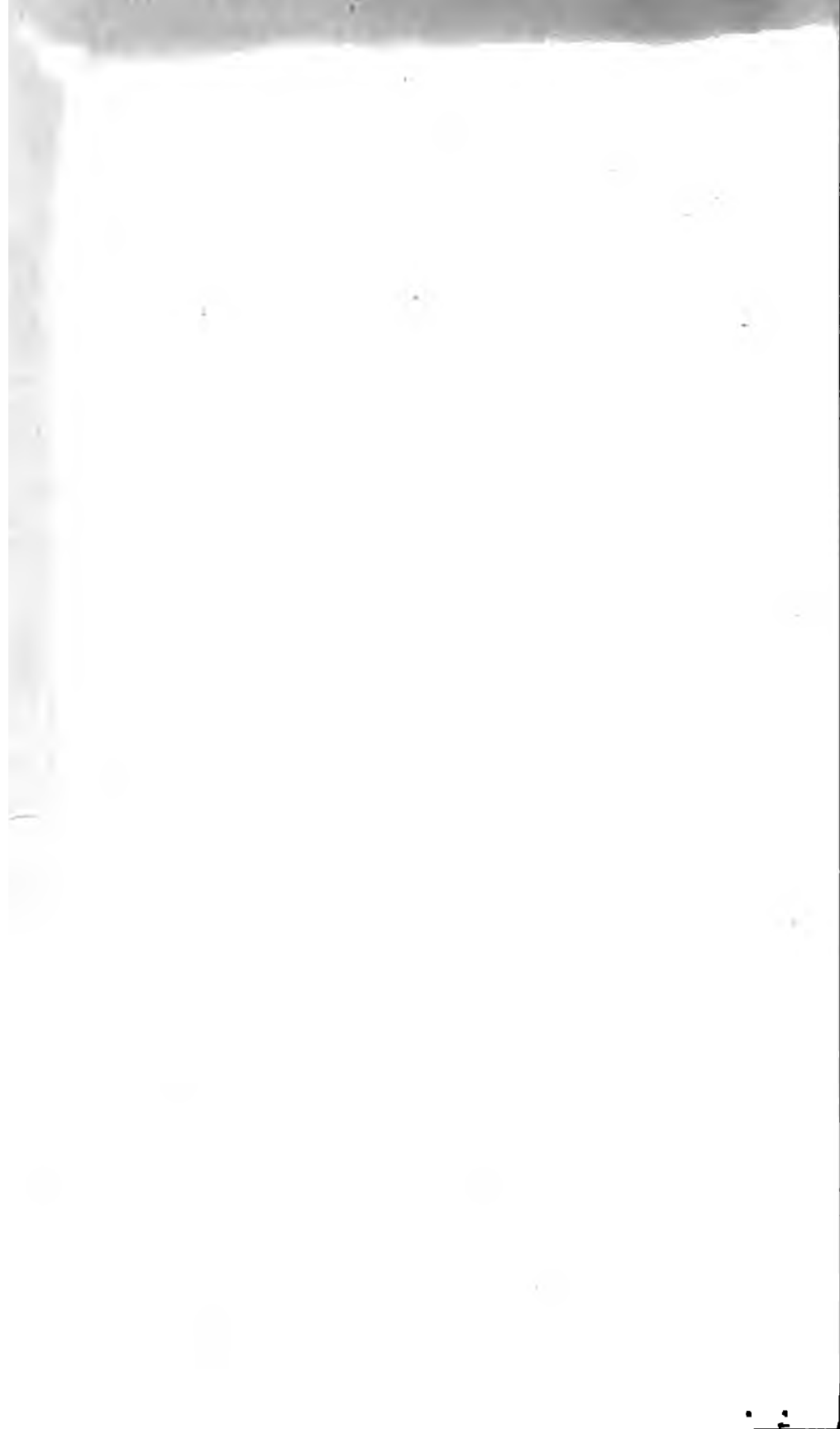
That the dividends, the gifts of which were revoked, were not undisposed of, but passed by the residuary bequest as income to those tenants for life of it whose interests were not revoked. — *Alt v. Gregory*, 221.

16. After a trifling specific bequest a testator gave his residuary real and personal estate upon trusts for the benefit of his granddaughter and her children. By a codicil, which he directed to be annexed to, and taken as part of his will, he, in consideration of the faithful services of his servant J. R., gave and bequeathed to him "the whole of" the testator's "estate" and "all" his household goods and furniture, linen, china, watches and all other the testator's personal property and effects, free from legacy duty: and the testator confirmed his will in all other particulars thereof: *Held*, affirming the decision of the Vice-Chancellor of the Duchy of Lancaster (*dissentiente* L. J. TURNER), that the devise in the will of the real estate was not revoked by the codicil. — *Molyneux v. Rowe*, 368.
17. A testator contracted to sell lands which he had devised, with stipulations as to easements by reference to a plan, which was lost, and had never been stamped. The purchasers paid the deposit and entered into possession on the footing of the contract, but before any conveyance was executed or any further payment made they became bankrupts. Their assignees elected not to complete the contract, and the property was sold under the bankruptcy, on the petition of the testator, as having a lien for the unpaid purchase-money. He bought it back at the sale for less than the amount due to him, and proved for the difference. * On his dying without altering or republishing his will, *held*, that the will was revoked by the contract, and not set up again by its abandonment. — *Andrew v. Andrew*, 336.

See DECLARATORY DECREE. ELECTION. LEGACY. TRUSTEES, 1.
 WILLS ACT. See WILL, 10.
 WINDING-UP. See CONTRIBUTORY. INSURANCE COMPANY.
 WRITING. See FRAUDS, STATUTE OF.

[690]





Stanford Law Library



3 6105 062 776 336

